

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

DOCTOR TERM [REDACTED] 1900

No. [REDACTED] 88

GEORGE J. WEIGLE, APPELLANT.

CURTIS BROTHERS CO.



APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF WISCONSIN.

FILED [REDACTED] 11, 1901

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(25,653)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 823.

GEORGE J. WEIGLE, APPELLANT,

vs.

CURTICE BROTHERS CO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF WISCONSIN.

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1 United States District Court, Western District of Wisconsin.

CURTICE BROTHERS CO., Plaintiff,

vs.

GEORGE J. WEIGLE, Defendant.

H. O. Fairchild, Solicitor for plaintiff.

W. C. Owen and Walter Drew, Solicitors for defendant.

2 District Court of the United States, for the Western District
of Wisconsin.

At a term of the District Court of the United States of America begun and held at the city of Madison in said District on the first Tuesday of December, A. D. 1915.—Sanborn, J.—Among others the following proceedings were had, to-wit:

CURTICE BROTHERS CO., Plaintiff,

vs.

GEORGE J. WEIGLE, Defendant.

Be it remembered, that heretofore, to-wit; on the 14th day of January, in the year of our Lord one thousand nine hundred and sixteen, came the said Curtice Brothers Co. by H. O. Fairchild, their solicitor, and filed in the office of the Clerk of the District Court of the United States for the Western District of Wisconsin, their bill of complaint as follows to-wit:

3 UNITED STATES OF AMERICA,
State of Wisconsin:

In the District Court of the United States, for the Western District
of Wisconsin.

In Equity.

CURTICE BROTHERS CO., Plaintiff,

vs.

GEORGE J. WEIGLE, Defendant.

To the Honorable the Judges of the District Court of the United
States, for the Western District of Wisconsin:

Curtice Brothers Co., a corporation of the state of New York and a citizen of said state of New York, brings this its bill of complaint against George J. Weigle, a resident of the City of Madison, in said State of Wisconsin, and a citizen of said State of Wisconsin.

And thereupon your orator, the plaintiff, complains and says:

(1) Your orator now is and for many years last past has been

engaged in the business of manufacturing from fruits, various food products and condiments, including ketchup, jellies, jams, preserves, mince-meat, chili sauce and sweet pickled peaches and pears, at its factory located in the City of Rochester, in said state of New York, in which business it has employed constantly during the entire year a large number of employees and a money investment of several million dollars.

(2) That said named food products are put up by your orator for sale in glass bottles and jars of various sizes to satisfy the demands of the trade, which are carefully labeled by your orator, stating among other things the contents, by whom and where manufactured, and in all other respects complying with the provisions of the Food & Drugs Act of Congress of June 30, 1906, and the amendments thereof and the rules and regulations made and promulgated by the Secretaries of the Treasury, of Commerce and Labor and of Agriculture, under the provisions of such Act of Congress; that large quantities of such named food products are sold by your orator and shipped throughout the United States, in interstate commerce, to jobbers and retailers—the said bottles and jars being packed for that purpose in wooden cases containing a number of such individual containers—which said bottles and jars when sold to retailers, either by jobbers within or without the state of Wisconsin, in the customary or usual channels of trade or commerce, or by your orator, are removed from such wooden cases and sold by the single bottle or jar to consumers, who may either themselves consume such food products, or, in the case of restaurant and hotel keepers, such food products are served in said bottles and jars to their guests at their dining tables or stands for consumption thereat.

(3) Your orator represents that in the preliminary stages of the preparation of such fruit for use in the manufacture of its said named food products, and in the preservation of fresh fruit before use is made of it, it may not always certainly be known when such fruit may be used or to just which of such products the particular fruit may be devoted, and it becomes necessary, as your orator is advised and believes, in order, in the mean time to preserve the purity and distinctive flavor of the particular fruit, to use as a preservative therein benzoate of soda; and also in the immediate manufacture of said several named food products, your orator is advised and believes, in order to preserve the purity and distinctive flavor of the particular fruit of which the same is manufactured, it becomes necessary, when not used at another stage, to use as a preservative therein benzoate of soda and your orator, accordingly, for the purposes aforesaid, adds to such products as a preservative ingredient, a small percentage of benzoate of soda—the presence and amount of which are plainly stated upon the label placed by your orator upon each container or package of such food, to-wit, the bottle or jar aforesaid.

(4) Your orator represents that it began the use of benzoate of soda as a preservation as aforesaid about the year 1902; but that prior to beginning such use it consulted learned scientists who were in every way fitted to have and express an opinion on that subject,

as to the effect upon health of benzoate of soda when used as a preservative ingredient in your orator's said food products, and were advised by such learned scientists that benzoate of soda is not poisonous or deleterious, or harmful to health when used in food products; whereupon your orator, acting in the belief that the advice of such scientists was in exact accord with truth, began to use and has ever since continued to use benzoate of soda in the preparation of its said named food products—plainly stating as aforesaid upon each and every label placed by your orator upon the bottles and jars in which it puts up such foods the presence and amount therein of benzoate of soda.

6 Your orator is advised and alleges that as respects the effect upon health of benzoate of soda when used as a preservative in foods, the rules of law, in that behalf obtaining, require judicial notice of the fact that benzoate of soda is not poisonous or deleterious or harmful to health, because by authority of the provisions of the Act of Congress of the United States Public No. 382, approved June 30, 1906, the Secretary of Agriculture, through the use of the agencies therein directed, ascertained and determined the fact to be that benzoate of soda mixed with foods is not deleterious or poisonous, and is not injurious to health, and the Secretaries of the Treasury, of Commerce and Labor and of Agriculture, acting under the authority of Section 3 of the Food and Drugs Act of June 30, 1906, made and promulgated as a regulation for carrying out the provisions of said latter act, first on the 3rd day of March, 1909, in Food Inspection Decision 104, and afterwards by incorporation, on the 10th day of April, 1913, into the body of "Rules and Regulation for the Enforcement of the Food and Drugs Act" aforesaid, as Regulation 15, such ascertainment and determination of fact—such Food Inspection Decision 104 and Regulation 15, being in the customary form in which such rules and regulations are usually made and promulgated, and the former being in the words and figures following, to-wit:

United States Department of Agriculture.

Office of the Secretary.

Board of Food and Drug Inspection.

Food Inspection Decision 104.

Amendment to Food Inspection Decisions No. 76 and No. 89, Relating to the use in foods of Benzoate of soda.

7 The Referee Board of Consulting Scientific Experts, composed of Dr. Ira Remsen, Dr. Russell H. Chittenden, Dr. John H. Long, Dr. Alonzo E. Taylor and Dr. C. A. Herter, have reported upon the use of benzoate of soda in foods. The Board reports, as a result of three extensive and exhaustive investigations, that benzoate of soda mixed with food is not deleterious or poison-

ous and is not injurious to health. The summary of the report of the Referee Board is published herewith.

It having been determined that benzoate of soda mixed with food is not deleterious or poisonous and is not injurious to health, no objection will be raised under the Food and Drugs Act to the use in food of benzoate of soda, provided that each container or package of such food is plainly labeled to show the presence and amount of benzoate of soda.

Food Inspection Decision 76 and 89 are amended accordingly.

GEORGE B. CORTELYOU,

Secretary of the Treasury,

JAMES WILSON,

Secretary of Agriculture,

OSCAR S. STRAUS,

Secretary of Commerce and Labor.

Your orator further represents that the said Regulation 15 as taken from the body of such Rules and Regulations as aforesaid is in the words and figures following, to-wit—omitting paragraph d, which relates to saccharine only:

8 *"Regulation 15. Wholesomeness of Colors and Preservatives.*

(As amended to accord with F. I. D. 104. See also F. I. D. 76, 89, 92, 101, 102, 135 and 138 for rulings under this head.)

(Section 7, Paragraph 5, under "Foods.")

(a) Respecting the wholesomeness of colors, preservatives, and other substances which are added to foods, the Secretary of Agriculture shall determine from chemical or other examination, under the authority of the agricultural appropriation act, Public 382, approved June 30, 1906, the names of those substances which are permitted or inhibited in food products; and such findings, when approved by the Secretary of the Treasury and the Secretary of Commerce and Labor, shall become a part of these regulations.

(b) The Secretary of Agriculture shall determine from time to time, in accordance with the authority conferred by the agricultural appropriation act, Public 382, approved June 30, 1906, the principles which shall guide the use of colors, preservatives and other substances added to foods; and when concurred in by the Secretary of the Treasury and the Secretary of Commerce and Labor, the principles so established shall become a part of these regulations.

(c) It having been determined that benzoate of soda mixed with food is not deleterious or poisonous and is not injurious to health, no objection will be raised under the food and drugs act to the use in food of benzoate of soda, provided that each container or package of such food is plainly labeled to show the presence and amount of benzoate of soda. Food Inspection Decisions 76 and 89 are amended accordingly."

Your orator, however, admits that but for the authority of such acts of Congress, ascertainment, determinations of fact and regulations, the courts would not be required to take such judicial notice, although as your orator is advised and represents if the fact were open to controversy, then all jurisdiction to determine whether benzoate of soda is poisonous or deleterious or harmful to health, when and as so used by your orator would be, by the said Food and Drugs Act, vested solely in the Federal Courts, to be exercised when and as therein provided.

9 (5) Your orator further represents that it sells and ships, and for many years has sold and shipped its said *said* food products in interstate commerce very extensively throughout the United States, except into the states of Wisconsin and North Dakota, and prior to the passage of the statutes hereinafter referred to by said state of Wisconsin, it annually sold and shipped in interstate commerce into Wisconsin many thousand dollars worth of its said food products, except chili sauce, and was enabled thereby to earn large profits from its said business; that all of such sales and shipments were made in interstate commerce for the reason that it has never had in the state of Wisconsin a factory or distributing warehouse, from which it could make such sales or shipments.

(6) Your orator represents that the legislature of Wisconsin enacted chapter 399 of the laws of 1909, which by its terms went into effect January 1, 1910, and was thereafter amended by chapter 663 of the laws of Wisconsin of 1911, which as incorporated into the Wisconsin Statutes of 1913 as Section 4601*g*, is now in effect and reads as follows, so far as material to this suit:

"Benzoic Acid.—Sale of foods, containing: It shall be unlawful to sell, offer or expose for sale or have in possession with intent to sell for use or consumption in this state, any article of food as defined in section 4600 of the statutes, which contains added benzoic acid or benzoates; provided, that when in the preparation of food products for shipment they are preserved by any external application of benzoic acid or benzoates in such a manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this section shall be construed as applying only when said products are ready for consumption.

10 Penalty.—Any person who, by himself, his servant or agent, or as the servant or agent of any other person, or as the servant or agent of any firm or corporation, shall violate any of the provisions of this section shall upon conviction thereof be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars or by imprisonment in the county jail not less than thirty days nor more than sixty days."

(7) Your orator further represents that all the statutes of Wisconsin in this bill of complaint referred to are embodied in chapter 187 of the Wisconsin statutes of 1913, under the title "Of Offences Against the Public Health," which said Chap. 187 contains a pro-

vision in section 4600 thereof, now in force, which defines the term food as used in such chapter, and which reads as follows:

"The term 'food' as used herein shall include all articles used for food or drink or condiment by man, whether simple, mixed or compound, and all articles used or intended for use as ingredients in the composition thereof or in the preparation thereof."

That said section 4600 contained a further provision which is now in force and was at all times herein referred to in force, in connection with the said statutes referred to in this bill of complaint, which said latter provision reads as follows:

"Any person who shall, by himself, his servant or agent, or as the servant or agent of any other person, sell, exchange, deliver or have in his possession, with intent to sell, exchange, offer for sale or exchange, any * * * article of food which is adulterated, * * * shall be fined not less than twenty-five dollars, nor more than one hundred dollars, or be imprisoned in the county jail not less than thirty days nor more than four months."

Your orator further represents that said chapter 187 contains another provision, embraced in section 4601 thereof, which
 11 is now in force and was so in force in connection with all the other state statutes in this bill of complaint referred to, which provides among other things, that "an article shall be deemed to be adulterated within the meaning of the preceding (4600) section," in the case of foods, "if it contains any added substance or ingredient which is poisonous, injurious or deleterious to health or any deleterious substance not a necessary ingredient in its manufacture."

Your orator further represents that the legislature of said state of Wisconsin enacted—and the same is now in effect as a statute of such state—chapter 33 of the laws of 1905, which is incorporated in the Wisconsin statutes of 1913 as sections 4601e and 4601f—which, omitting the parts not material to this suit, read as follows:

"Section 4601e.—No person, firm or corporation shall, by himself, or by his agents or servants, manufacture, sell, ship, consign, offer for sale, expose for sale, or have in his possession with intent to sell for use or consumption within the state, any article of food within the meaning of Section 4600 of the statute, which contains formaldehyde * * * boric acid or borates * * * or any other preservatives injurious to health."

"Section 4601f.—Every person, firm or corporation, and every officer, agent, servant or employee of such person, firm or corporation, who violates any of the provisions of section 4601e shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than twenty-five nor more than one hundred dollars, or be imprisoned in the county jail not less than thirty days
 nor more than sixty days."

12 (8). Your orator further represents that during the summer and fall of the year 1915, it again entered upon the sale and shipment, in interstate commerce, to jobbers and retailers in Wisconsin, of its said food products, put up, prepared, labeled and shipped in the manner hereinbefore stated, and made such

sales and shipments in large quantities and at considerable profit, and continued the same until the making of the threats and interferences with such sales by and on the part of the defendant, George J. Weigle, his agents, inspectors and employees as hereinafter stated, when your orator was compelled to and did discontinue such sales and shipments.

Your orator represents that by a statute of Wisconsin which went into effect in the year 1898, and by subsequent acts of the legislature of said state amendatory thereof—all of which still remain in force—there was created the office of Dairy and Food Commissioner for said state, and it was thereby made the duty of such official to enforce all of the statutes of such state relating to the manufacture and sale of articles of food in said state—which said statutes include all the said several statutes hereinbefore referred to; and that the defendant, George J. Weigle, is now and for upwards of nine months last past has been the duly appointed, qualified and acting Dairy & Food Commissioner of Wisconsin, in pursuance of said statutes of 1898 and the acts amendatory thereof; and the said George J. Weigle, has, as such commissioner, in service in his said department and under his official direction and control,

13 numerous agents, inspectors and employees who are charged, among other duties, with the duty of making investigation into the composition of articles of food sold, shipped, consigned, offered or exposed for sale, or had in possession with intent to sell, for use or consumption within the state, as regards the ingredients composing the same, whether as preservatives or otherwise, with a view to ascertaining whether such food products are adulterated within the meaning of the statutes of Wisconsin hereinbefore referred to, particularly said section 4601*g*; and, if found to be so adulterated, to report the facts so ascertained by them to their said chief, the said George J. Weigle, to the end that he may institute or cause to be instituted prosecutions against all persons who are guilty of a violation of any of the provisions of the said statutes, for their conviction and punishment as in said statutes provided.

(9). Your orator further represents that the said agents, inspectors and employees referred to in the preceding paragraph of this bill of complaint, claiming to be carrying out the orders, directions, intents and purposes of their said chief, the defendant, George J. Weigle, and to be exercising their duties under the said statutes herein referred to having relation thereto, as your orator is informed and believes and therefore alleges, visited and are continuing to visit the places of business of retail dealers in the state of Wisconsin who have bought your orator's said food products in the city of Chicago, in the state of Illinois, also in the city of Rochester, in said state of New York, from your orator, also from
14 jobbers in other states than Wisconsin, as well as from jobbers in said state of Wisconsin, who have purchased in interstate commerce, from your orator, by the case, its said food products, and examined labels upon the bottles and jars in which such food products are put up and sold by it, which state the fact

of the use therein of benzoate of soda in the amount stated upon such labels, and declared to such retail dealers that all sales of such bottles or jars to consumers, or having the same in possession for that purpose, are in violation of the said statutes of the state of Wisconsin because of such added benzoate of soda, and have threatened and continue to threaten that if such dealers make sale thereof they will be prosecuted under the statutes aforesaid and punished according to the provisions thereof—the said agents, inspectors and employees well knowing, as the fact is and as is disclosed on such labels, that such food products were put up and are being put up by your orator in another state than Wisconsin and shipped into such state in interstate commerce for ultimate sale to consumers in said state of Wisconsin in the individual container or package bearing such label.

Your orator further represents that it is informed and believes, and therefore alleges the fact to be, that such agents, inspectors and employees have visited and are continuing to visit restaurants in the state of Wisconsin, at which your orator's said food products, especially ketchup, are being served on the tables or at the stands to the guests of such restaurants for consumption thereat, and threaten the keepers of such restaurants with prosecution

15 for furnishing such ketchup to their said guests, in the manner and for the purposes aforesaid, asserting to such restaurant keepers that such furnishing for consumption is, within the meaning of the statutes of said state, a sale for use or consumption in violation of the laws of said state, and punishable thereunder, although, as such agents, inspectors and employees well know, as the fact is, all such ketchup was purchased from your orator in a foreign state and shipped into Wisconsin in interstate commerce, and that the same had been purchased by such restaurant keepers for consumption at their dining tables or stands by their guests from retailers who had either purchased the same from your orator or from Wisconsin jobbers, who had purchased the same from your orator.

(10). Your orator further represents that it is informed and believes, and therefore alleges the fact to be, that the defendant, George J. Weigle, in order that his construction of the statutes of Wisconsin, and his intended action thereunder may be known to the public, particularly dealers and consumers, publicly declares that each of the Wisconsin statutes hereinbefore referred to, regarding the adulteration of food by the addition thereto of benzoate of soda, or of any poisonous or deleterious ingredient harmful to health, is as applicable to your orator's said food products and each of them sold in a foreign state and shipped in interstate commerce to Wisconsin to dealers, whether jobbers or retailers, for ultimate sale by them and purchase by consumers, as though such

.. food products had been manufactured and sold in Wisconsin,
16 without ever having been in interstate commerce or subject to the provisions of the Food and Drugs Act of Congress aforesaid, especially when such food products are being sold by the retailer by the single bottle or jar to the consumer, or are being

used by restaurant keepers for consumption by their guests at their dining tables and stands, and such retailer has purchased from a jobber in Wisconsin who has purchased the same in the customary or usual channels of trade or commerce from your orator, of a jobber in a foreign state.

Your orator is informed and believes, and therefore alleges the fact to be, that the said defendant, George J. Weigle, declares his entire approval of the acts and threats aforesaid of his said agents, inspectors and employees, and publicly declares that it is his intention to execute and enforce each and every of said Wisconsin statutes, in the spirit and with the construction as set out in this bill of complaint, and as declared as aforesaid by such agents, inspectors and employees against all violators thereof.

(11). Your orator further represents that it is advised and believes, and therefore alleges, that neither of the statutes of Wisconsin hereinbefore referred to, relating to the adulteration of food products, and especially said section 4061g of the Wisconsin statutes of 1913, has any application whatever to the food products aforesaid of your orator, which in every case are sold and shipped into

17 Wisconsin in interstate commerce from a foreign state for sale and consumption therein, in their individual container or package, the bottle or jar, in which it was originally put up by your orator in such foreign state and labeled therein, as required by the Federal acts, rules and regulations applicable thereto; but that the legality of all sales to consumers by retailers or to retailers by jobbers, or the furnishing of such food products by restaurant keepers, in the manner and for the purposes hereinbefore stated, to their guests for consumption as such, and the question whether such food products are so sold or furnished are adulterated because of the added ingredient of benzoate of soda as a preservative, in the manner and under the conditions hereinbefore set out, are matters wholly within the jurisdiction of the Federal courts under the provisions of the Food & Drugs Act of Congress aforesaid, to be determined as therein provided, and in accordance with the provisions of such act and the ascertainment and determination aforesaid under the authority of said Act of Congress, Public No. 382, approved June 30, 1906, and the rules and regulations made and promulgated by the Secretaries of the Treasury, of Commerce and Labor and of Agriculture, as aforesaid, under section 3 of said Food and Drugs Act; and that said several state statutes relating to adulteration, its ascertainment and punishment, as so applied to interstate food articles, are in violation of the rights of your orator under the provisions of said Food & Drugs Act of Congress as well as under the Commerce Clause of the constitution

of the United States (Sec. 8 Act. I), in pursuance of and in the enforcement of which said Food & Drugs Act was passed by the Congress of the United States; and the said conduct of the said defendant, George J. Weigle, and of his said agents, inspectors and employees, approved and concurred in by him, is illegal and without jurisdiction and in violation of the rights of

your orator under the said Food & Drugs Act and the Commerce Clause of the Federal Constitution aforesaid.

(12) Your orator further represents that by reason of the declared purpose of the said defendant, George J. Weigle, and his declared construction and application of the said state statutes, particularly said section 4601g, and by reason of the conduct and threats so as aforesaid made by him and his agents, inspectors and employees, dealers who have purchased your orator's food products at Rochester, N. Y., or in the city of Chicago, Ill., and which have been shipped to them in interstate commerce and sold by them to consumers, upon learning of the attitude aforesaid of the said defendant, George J. Weigle, have notified your orator that they will not deal in such food products and insist upon your orator taking back such food products so sold and shipped to them and refunding the money paid by them therefor; and your orator is informed and believes, and therefore represents the fact to be, that restaurant keepers who have bought your orator's said food products for use by their guests as aforesaid, and been warned as aforesaid by the agents,

inspectors and employees of the said defendant, George J. Weigle, that furnishing the same to their said guests for consumption as aforesaid is an illegal act subject to prosecution and punishment under the said statutes of the state of Wisconsin, have returned said food products, particularly the article ketchup, to the retailers thereof from whom they purchased the same, and such retailers insist upon your orator taking such articles back and repaying them the purchase price thereof.

(13) Your orator further represents that unless the defendant George J. Weigle, his agents, inspectors and employees, be permanently restrained from enforcing the statutes of Wisconsin hereinbefore referred to and each thereof, particularly said section 4601g of the Wisconsin statutes of 1913, in respect to the adulteration of your orator's said food products because containing benzoate of soda as an added ingredient as aforesaid, a multitude of prosecutions under said statutes, particularly said section 4601g, will be commenced against dealers in your orator's said food products, and your orator's customers, and the customers of jobbers who have purchased from your orator, will be greatly harassed and put to cost and dissuaded from dealing in your orator's said food products, and your orator's trade and business in said food products in Wisconsin, which it now enjoys, will be entirely destroyed and your orator will be wholly prevented from enlarging or extending its said trade and business in Wisconsin, as it lawfully may do and would do with very great profit to itself, but for the unlawful acts and

20 threats aforesaid of the defendant George J. Weigle and his said agents, inspectors and employees; all to the irreparable injury of your orator.

(14) Your orator further represents that the said threats and acts of the defendant, George J. Weigle, already made and done, and similar conduct threatened by him in the future, are contrary to equity and the rights of your orator, and will result in a continuing and irreparable injury to your orator—which injury can-

not be adequately compensated for or in damages or by any remedy at law, but only by relief in equity.

(15) Your orator is informed and believes, and therefore alleges the fact to be, that the financial responsibility of the said George J. Weigle is wholly insufficient to respond in damages to your orator for the loss which will result to it by reason of the threatened acts to be done by the said George J. Weigle, as hereinbefore stated, if he be permitted to execute the same or to enforce any of the statutes of Wisconsin hereinbefore set out, particularly said section 4601g of the Wisconsin statutes of 1913.

For inasmuch, therefore, as your orator is without adequate remedy in the premises, except in a court of equity, and to the end that the said George J. Weigle, who is made defendant in this your orator's bill of complaint, may be required to make and file a complete answer to the same, but not under oath (answer under
21 oath being hereby expressly waived) and that this honorable court may make and enter its decree declaring:

(1) Said section 4601g of the Wisconsin statutes of 1913 invalid under the provisions of the Food & Drugs Act of Congress and the Commerce Clause of the Federal constitution, as applied to your orator's said food products so sold and shipped by it to jobbers or retailers from other states than Wisconsin, and being sold, shipped, consigned, offered or exposed for sale, or had in possession with intent to sell for use or consumption within the state of Wisconsin by jobbers to retailers, or being sold by retailers, offered or exposed for sale or had in possession with intent to sell by retailers, for use or consumption by purchasers, or being furnished by restaurant keepers to their guests for consumption as such at their dining tables or stands, as aforesaid, provided such food products when so sold, offered or exposed for sale, or had in possession with intent to sell for use or consumption, or being furnished to guests by restaurant keepers, within the state, are contained in the original containers, the bottle or jar, as put up, labeled, sold and shipped by your orator, unopened, or in the case of restaurant keepers, opened for the sole purpose of use and consumption by their guests in the manner hereinbefore stated; and such food products have been transported from your orator, as the manufacturer thereof, in a foreign state, to such consumer for consumption, or to such restaurant keeper for use in the manner in this bill of complaint
22 stated, through the customary or usual channels of trade or commerce, whether the sale to the consumer or such restaurant keeper be by a retailer who purchased directly from your orator as the manufacturer, or by a retailer who purchased from a jobber, within or without the state of Wisconsin, who had purchased from your orator or other jobber;

(2) Said sections 4600, 4601, 4601e and 4601f, and each of them, insofar as their provisions are set out in terms or in effect herein, invalid under the Food & Drugs Act of Congress and the said Commerce Clause of the Federal Constitution, as applied to your orator's said food products so sold and shipped by it to jobbers or retailers from other states than Wisconsin, and being sold, shipped, con-

signed, offered or exposed for sale or had in possession with intent to sell for use or consumption within the state of Wisconsin, by jobbers to retailers, or being sold by retailers, offered or exposed for sale or had in possession with intent to sell by such retailers, for use or consumption by purchasers, or being furnished by restaurant keepers to their guests for consumption as such at their dining tables or stands, as hereinbefore stated; provided such food products, when so sold, offered or exposed for sale or had in possession with intent to sell for use or consumption, or being furnished to guests by restaurant keepers, within the state, are contained in the original containers, the bottle or jar, as put up, labeled, sold and shipped by your orator, unopened, or in the case of restaurant keepers, opened

23 for the sole purpose of use and consumption by their guests in the manner hereinbefore stated, and such food products, having been transported from your orator, as the manufacturer thereof, in a foreign state, to such consumer for consumption or to such restaurant keeper for use in the manner in this bill of complaint stated, through the customary or usual channels of trade or commerce, whether the sale to the consumer or restaurant keeper be by a retailer who purchased directly from your orator as the manufacturer, or by a retailer who purchased from a jobber within or without the state of Wisconsin, who had purchased from your orator or other jobber;

And that the said George J. Weigle, his agents, inspectors and employees, and all persons acting under his direction or at his instance, be permanently restrained by the writ of injunction issued out of this court:

(1) From bringing or threatening to bring any prosecution, or making or threatening to make any complaint as a basis for a prosecution, or from taking or threatening to take any action or proceeding whatever for the enforcement of said section 4601g of the Wisconsin statutes of 1915, or for the enforcement of said sections 4600, 4601, 4601e and 4601f, or either of said sections, in so far as they do in fact or may be construed to declare, as an adulteration or illegal the use of benzoate of soda as a preservative ingredient in any of your orator's said food products which have been sold and brought into the state of Wisconsin from a foreign state, and are being sold, shipped, consigned, offered or exposed for sale or had in

24 possession with intent to sell for use or consumption within the state of Wisconsin, by jobbers to retailers, or being sold by retailers, offered or exposed for sale or had in possession with intent to sell by such retailers, for use or consumption by purchasers, or being furnished by restaurant keepers to their guests for consumption as such at their dining tables or stands, as hereinbefore stated; provided such food products when so sold, offered or exposed for sale or had in possession with intent to sell for use or consumption, or being furnished by restaurant keepers within the state of Wisconsin, are contained in the original containers, the bottle or jar, as put up, labeled, sold and shipped by your orator, unopened, or in the case of restaurant keepers, opened for the sole purpose of use and consumption by their guests in the manner

hereinbefore stated, and such food products have been transported from your orator, as the manufacturer thereof, in a foreign state, to such consumer for consumption or to such restaurant keeper, for use in the manner in this bill of complaint stated, through the customary or usual channels of trade or commerce, whether the sale to the consumer or restaurant keeper be by a retailer who purchased directly from your orator as a manufacturer, or by a retailer who purchased from a jobber, within or without the state of Wisconsin, who had purchased from your orator or other jobber;

(2) From declaring, reporting, or in any manner intimating to Wisconsin jobbers, who are engaged in the sale by the case as 25 in this bill stated, or to retailers who are engaged in the sale by the original unbroken container or package, the bottle or jar aforesaid, of your orator's said named food products, so as aforesaid imported into Wisconsin, or to restaurant keepers, making use upon their tables or stands of such articles for consumption by their guests as in this bill of complaint alleged, or to consumers of your orator's said named food products, or either or any of them, that such sale, by them or either of them being made, or such use, is illegal or unauthorized because in violation of section 4601g of the Wisconsin statutes of 1913, or of either of the statutes of Wisconsin referred to in this bill of complaint.

And may it please your honors to grant such further or other relief in the premises as to your honors may seem meet and as equity requires.

And may it please your honors to grant unto your orator the process of subpoena issued out of and under the seal of this honorable court, returnable into the office of the clerk of this court twenty days from the issue thereof, directed to the said George J. Weigle, with a memorandum placed at the bottom thereof, that the defendant be required to file his answer or other defense in the said clerk's office on or before the twentieth day after service of such subpoena, excluding the date thereof; otherwise the bill may be taken pro confesso, all in accordance with the rules and practice for courts of equity in that behalf obtaining.

CURTICE BROTHERS CO.,
By H. O. FAIRCHILD,
Solicitor for Plaintiff.

H. O. FAIRCHILD,
Solicitor for Plaintiff.

26 STATE OF NEW YORK,
Monroe County, ss:

Robert A. Badger, being first duly sworn, deposes and says that he is the secretary of Curtice Brothers Co., the plaintiffs named in the foregoing bill of complaint; that he is specially authorized by said plaintiff to make this verification on its behalf; that he is familiar with all the business affairs of said plaintiff and with all the facts and circumstances set out in said bill of complaint which he has read and knows the contents thereof; that all the allegations in said bill

of complaint made on the part of the plaintiff are true to his own personal knowledge, except such as are therein stated on information and belief, and as to all such matters he believes it to be true; that the grounds of such belief are either investigation made by the deponent personally into such facts and circumstances, or information received from other reliable sources with respect thereto.

ROBERT A. BADGER.

Subscribed and sworn to before me this 30th day of December, 1915.

[L. s.]

JOSEPH A. TAIT,
Notary Public, Monroe County, New York.

My commission expires March 30, 1917.

Endorsed: 42-E C. Dk. Original. United States of America, State of Wisconsin. District Court of United States, Western District of Wisconsin. Curtice Bros. Company, plaintiff, vs. George J. Weigle, defendant. Bill of complaint. Filed Jan. 14, 1916. F. W. Oakley, Clerk. H. O. Fairchild, solicitor for plaintiff.

27 Afterwards, to-wit, January 18, 1916, filed chancery subpoena as follows:

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

The President of the United States of America to George J. Weigle, Greeting:

We command you and every of you, that you be and appear before our Judges of our District Court of the United States of America, for the Western District of Wisconsin, at Madison in said District, on or before the twentieth day after service of this writ, exclusive of the day of service, to answer or otherwise defend against a certain bill in equity this day filed by Curtice Brothers Co. in the Clerk's office of said Court, in said city of Madison, Wisconsin, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshal of the Western District of Wisconsin to execute.

Witness the Honorable Arthur L. Sanborn, Judge of the District Court of the United States of America, for the Western District of Wisconsin, at Madison aforesaid, this 14th day of January in the year of our Lord nineteen hundred and sixteen and of our Independence the 140th year.

[L. s.]

F. W. OAKLEY, *Clerk.*

Memorandum.

The defendant is required to file his answer or other defense in the Clerk's office at Madison, Wisconsin on or before the twentieth

day after service hereof upon him, excluding the day of service; otherwise the said bill may be taken *pro confesso*.

F. W. OAKLEY, *Clerk*.

28 Endorsed: No. 42-E C. Dk. District Court of the United States, Western District of Wisconsin. Curtice Brothers Co., complainant, vs. George J. Weigle, defendant. Chancery subpoena. H. O. Fairchild, complainant's solicitor, Green Bay, Wis. Filed Jan. 18, 1916. F. W. Oakley.

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

I hereby certify and return that on this 17th day of January, 1916, at Madison, in Dane County, Western District of Wisconsin, I served this chancery subpoena on the within named George J. Weigle by delivering to and leaving with him personally a true copy thereof, together with a copy of the bill of complaint herein mentioned.

R. J. FLINT,
United States Marshal.

Afterwards, to wit, February 4, 1916, filed motion to dismiss bill, as follows:

29 UNITED STATES OF AMERICA,
State of Wisconsin:

In the District Court of the United States for the Western District of Wisconsin.

In Equity.

CURTICE BROTHERS Co., Plaintiff,
vs.
GEORGE J. WEIGLE, Defendant.

Motion by Defendant to Dismiss Plaintiff's Bill of Complaint.

Now comes the defendant in the above entitled cause, by W. C. Owen and Walter Drew, his solicitors, and herewith moves the court to dismiss the bill of complaint filed in the above entitled cause, and for reasons says that the plaintiff has not, in and by its said bill, made or stated such a case as entitles him in a court of equity to any discovery or relief against the defendant, as to the matters contained in said bill or any of such matters, and that, therefore, this defendant should not be compelled to answer the said bill.

And for other reasons to be made known at the hearing.

W. C. OWEN,
WALTER DREW,
Solicitors for Defendant.

30 Endorsed: 42-E. C. Dk. United States of America, State of Wisconsin. In the District Court of the United States, for the Western District of Wisconsin. Curtice Brothers Co., plaintiffs, v. George J. Weigle, defendant. Motion to dismiss bill. Filed Feb. 4, 1916. F. W. Oakley, Clerk.

31 Afterwards, to-wit, November 4, 1916, filed order denying defendant's motion to dismiss bill, as follows:

United States District Court, Western District of Wisconsin.

CURTICE BROTHERS CO., Plaintiff,

vs.

GEORGE J. WEIGLE, Defendant.

At the term of said court commenced on the first Tuesday of December, 1915, and continued and held on the second day of November, 1916, in the United States Court Room, in the city of Madison, Wisconsin.

Present, Hon. Arthur L. Sanborn, District Judge.

This matter coming on to be heard before the court on the motion of the defendant to dismiss the bill of complaint for want of equity, on the ground that it does not state facts sufficient to entitle the plaintiff to any equitable relief; after hearing the solicitors of the respective parties, for and in opposition to such motion, on motion of H. O. Fairchild, Esq., solicitor for complainant, W. C. Owen and Walter Drew, Esquires, solicitors for the defendant, opposing:

It is ordered that the said motion of the defendant be, and the same hereby is, denied, and that the plaintiff have a decree according to the prayer of its bill filed herein; but with leave to the defendant to answer such bill, if it be so advised, within twenty days from the date of the service upon his solicitors of a copy of this order.

By the Court,

A. L. SANBORN,
District Judge.

Nov. 2, 1916.

32 Endorsed: Original. 42-E C. Dk. United States District Court, Western District of Wisconsin. Curtice Bros. Co., plaintiff, vs. George J. Weigle, defendant. Order denying defendant's motion to dismiss bill. Filed Nov. 4, 1916. F. W. Oakley, Clerk. Greene, Fairchild, North, Parker & McGillan, attorneys. Suite 509 Bellin-Buchanan Building, Green Bay, Wisconsin.

Afterwards, towit, October 30, 1916, filed decision overruling motion to dismiss bill, as follows:

33 United States District Court, Western District of Wisconsin.

CURTICE BROTHERS COMPANY, Plaintiff,

vs.

GEORGE J. WEIGLE, Defendant.

Motion of defendant to dismiss the bill for want of equity, on the ground that it does not state facts sufficient to entitle the plaintiff to any equitable relief.

Recognizing the great difficulty of the questions raised by the motion, I have reached the conclusion that the motion should be denied, and will very briefly give the reasons:

I think Congress by the Food and Drugs Act has made the immediate container the package of interstate commerce, by providing that such container shall bear the food label and by authorizing the seizure of such container by the federal courts, and the destruction of its contents, in case it be decided that it is misbranded. This I think is established by the McDermott case and by the provisions of the statute. This container is the package of interstate commerce, as well as the large package in which the interstate shipment is made, and the state has no power to prevent its sale.

This view is confirmed, I think, by the special legislation authorizing the Secretary of Agriculture to investigate food adulterations and publish results, followed by investigation and such publication, and the inspection decision of the three secretaries.

Oct. 30, 1916.

A. L. SANBORN, *Judge.*

Endorsed: 42-E C. Dk. United States District Court, Western District of Wisconsin. Curtice Bros. Co., plaintiff, vs. George J. Weigle, defendant. Decision overruling motion to dismiss bill. Filed Oct. 30, 1916. F. W. Oakley, Clerk.

Afterwards, towit, November 23, 1916, filed decree, as follows:

35 UNITED STATES OF AMERICA,
State of Wisconsin:

District Court of the United States, Western District of Wisconsin.

CURTICE BROTHERS Co., Plaintiff,
vs.
GEORGE J. WEIGLE, Defendant.

At the December term of the District Court of the United States for the Western District of Wisconsin, commenced on the first Tuesday of December, 1915, and continued and held on the 23rd day of November, 1916, in the United States Court Room, in the city of Madison, Wisconsin.

Present: Hon. Arthur L. Sanborn, District Judge.

This cause coming on to be heard at the December term for 1915 of said court on the motion of the defendant to dismiss the bill of complaint for want of equity on the ground that it does not state facts sufficient to entitle the plaintiff to any equitable relief; and the court having, on November 2, 1916, denied said motion and ordered that the plaintiff have a decree according to the prayer of the bill of complaint, but with leave to the defendant to answer the bill of complaint if he be so advised, within twenty days from the date of service upon his solicitors of a copy of such order; and the defendant having come into open court and declined to further answer the bill of complaint—but nevertheless disavowing any
36 claim on his part that either of the statutes of the state of Wisconsin mentioned in the bill of complaint, to wit, sections 4601g, 4600, 4601, 4601e or 4601f, Wisconsin Statutes, covers or is intended to cover, or in any manner affect sales, offers or exposures for sale, or having in possession with intent to sell, by the importer into the state, in the unbroken outer wooden package enclosing immediate containers, to wit, bottles or jars, in which they are shipped into said state, any of the plaintiff's food products, either at wholesale or retail, for use or consumption in the state of Wisconsin, on motion of H. O. Fairchild, Esq., solicitor for the plaintiff, W. C. Owen, Esq., and Walter Drew, Esq., solicitors for the defendant opposing.

It is ordered, adjudged and decreed, that the facts set out in the bill of complaint are true as therein alleged; and that the disavowal aforesaid of the part of the defendant is regarded by the court as taking out of the case the subject matter of such disavowal;

It is further ordered, adjudged and decreed that said sections 4601g, 4600, 4601, 4601e and 4601f, Wisconsin Statutes, are, and each of them is, invalid as applied to any and all sales in said state of Wisconsin by any jobber, wholesaler or retailer of the said food products of the plaintiff mentioned in the complaint, to wit, ketchup, jellies, jams, preserves, mince-meat, chili sauce and sweet pickled peaches and pears, whether such jobber, wholesaler or retailer within

the state purchased the same by the unbroken wooden package from the plaintiff as manufacturer without the state or from a jobber or wholesaler within or without the state, or such sale of the

37 plaintiff's said food products to a retailer to be by him resold within the state to his customers for use or consumption therein, be by the unbroken wooden package or the unbroken immediate container, the single bottle or jar, or whether such sale to the retailer be by the importer of such food products into the state or by a purchaser from such importer, or sales by such retailer be by the unbroken wooden package or the unbroken immediate container, the single bottle or jar; and that such state statutes, so named, are, and each of them is, invalid also as applied to any and all offers or exposures of such food products for sale in such state by any such jobber, wholesaler or retailer, or having in possession by such jobber, wholesaler or retailer therein with intent to sell the same for use or consumption in said state, whether such offer, exposure or having in possession be in such outer wooden package or in such immediate container, the single bottle or jar—the container in all cases herein referred to being unbroken and being the same in which such food product was shipped into such state from another state; and that such state statutes, so named, are, and each of them is, invalid also as applied to restaurant keepers who furnish, in the customary manner to their guests for consumption at their dining tables or stands any of the plaintiff's said food products, in the open immediate container thereof, to wit, the bottle or jar, in which said food product was shipped into said state of Wisconsin—such invalidity in all cases covered by this decree resulting because of the

38 fact that said state statutes are, and each section thereof is, as so applied, in violation of the commerce clause of the Constitution of the United States and of the provisions of the Food and Drugs Act of Congress of June 30, 1906.

It is further ordered, adjudged and decreed that the defendant, George J. Weigle, his agents, inspectors and employees, and all persons acting under his direction or at his instance, including all district attorneys of the state of Wisconsin who may seek to enforce any of said state statutes in this decree particularly mentioned, be, and each of them hereby is, permanently enjoined:

(1) From bringing or threatening to bring any prosecution, or making or threatening to make any complaint as the basis for a prosecution, or from taking or threatening to take any action or proceeding whatever for the enforcement of said Section 4601g or said sections 4600, 4601, 4601e, 4601f, or either of such sections, of the Wisconsin Statutes, insofar as they do, or either of them does, or may be construed to declare as an adulteration or illegal the use of benzoate of soda as a preservative ingredient in any of the plaintiff's said food products, which have been sold and brought into the state of Wisconsin from another state, and have been or are being sold, shipped, consigned, offered or exposed for sale in said state, or had in possession therein with intent to sell, either in the said outer wooden container or the said immediate container thereof, either at wholesale or retail, for use or consumption within said

state, or have been or are being furnished in the customary manner by restaurant keepers to their guests for consumption at their dining tables or stands in the open immediate container thereof, the bottle or jar aforesaid, in which such product was shipped into the said state of Wisconsin;

(2) From declaring or, in any manner, intimating to any retailer, engaged in the sale in the state of Wisconsin of any of the plaintiff's said food products containing benzoate of soda as a preservative, by the unbroken bottle or jar, being the same immediate container in which such product was imported into said state, or to any restaurant keeper who is furnishing in the customary manner to his guests for consumption at his dining tables or stands any of the plaintiff's said food products in the open bottle or jar, being the same immediate container in which such product was shipped into the state, or to consumers thereof, that such sale by the retailer, or such furnishing to guests by the restaurant keeper is illegal or unauthorized, because in violation of said section 4601g or either of the other said sections of the Wisconsin statutes.

It is further ordered, adjudged and decreed that a writ of perpetual injunction be issued out of and under the seal of this court, in this suit, restraining said George J. Weigle, his agents, inspectors, employees and all other persons acting under his direction or at his instance, including all district attorneys of the state of Wisconsin who may seek to enforce any of said state statutes in this decree particularly mentioned, from the doing of any of the matters or things hereinbefore enjoined not to be done; and that service of said writ be forthwith made upon said George J. Weigle, or in lieu thereof that a certified copy of this decree be forthwith served upon said George J. Weigle.

It is further ordered, adjudged and decreed that the plaintiff, Curtice Brothers Co. do have and recover of and from the defendant, George J. Weigle, the sum of twenty-five dollars, its costs and disbursements herein taxed.

By the Court.

A. L. SANBORN,
District Judge.

Endorsed: Original. 42-E C. Dk. United States of America, District Court of United States, Western District of Wisconsin. Curtice Brothers Co., plaintiff, vs. George J. Weigle, defendant. Decree. Filed Nov. 23, 1916. F. W. Oakley, Clerk. H. O. Fairchild, solicitor for plaintiff.

Afterwards, to-wit, Nov. 29, 1916, filed appeal and allowance as follows:

In the District Court of the United States, Western District of Wisconsin.

GEORGE J. WEIGLE, Defendant, Appellant,
v.
CURTICE BROTHERS Co., Plaintiff, Appellee.

(Appeal and Allowance.)

The above named defendant, George J. Weigle, conceiving himself aggrieved by the decree entered November 23, 1916, in the above entitled proceeding, doth hereby appeal from said decree to the Supreme Court of the United States, and he prays that this his appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

WALTER C. OWEN,
Attorney General of the State of Wisconsin;
WALTER DREW,
Deputy Attorney General of the State of Wisconsin,
Solicitors for Defendant and Appellant,
State Capitol, Madison, Wisconsin.

And now, to wit, on November 29, 1916, it is ordered that the appeal be allowed as prayed for.

A. L. SANBORN,
District Judge.

Endorsed: 42-E C. Dk. In the District Court of the United States, Western District of Wisconsin. George J. Weigle, defendant, appellant, v. Curtice Bros., plaintiff, appellee. Appeal and allowance. Filed Nov. 29, 1916. F. W. Oakley, Clerk.

42 Afterwards, towit, Nov. 29, 1916, filed assignment of errors, prayer for reversal, as follows:

In the Supreme Court of the United States.

GEORGE J. WEIGLE, Appellant,
v.
CURTICE BROTHERS Co., Appellee.

(Assignment of Errors.)

And now comes George J. Weigle, Appellant, and makes and files this his assignment of errors:

1. The District Court of the United States for the Western District of Wisconsin erred in refusing to dismiss the bill in the action below for the reason and upon the ground that the plaintiff did

not in and by its said bill make or state such a case as entitled it in a court of equity to any relief against the defendant.

2. The District Court of the United States for the Western District of Wisconsin erred in denying the defendant's motion to dismiss the bill in the action below for the same reason.

3. The District Court of the United States for the Western District of Wisconsin erred in rendering its decree in the action below in favor of the plaintiff and against the defendant.

4. The District Court of the United States for the Western District of Wisconsin erred in holding sections 4601*g*, 4600, 4601, 4601*e*, and 4601*f*, of the statutes of the State of Wisconsin, and each of

43 them, as applied to sales, the offering for sale or the having in possession with intent to sell within the State of Wisconsin of the food products of the plaintiff containing benzoate of soda, when such sales are made or to be made other than by the importer thereof and in the unbroken package in which such food products are packed for shipment and shipped and transported and delivered to such importer, to be unconstitutional and void as in conflict with the Act of Congress known as the Food and Drugs Act of June 30, 1906.

5. The District Court of the United States for the Western District of Wisconsin erred in holding sections 4601*g*, 4600, 4601, 4601*e*, and 4601*f* of the statutes of the State of Wisconsin, and each of them, as applied to sales, the offering for sale or the having in possession with intent to sell within the State of Wisconsin of the food products of the plaintiff containing benzoate of soda, when such sales are made other than by the importer thereof and in the unbroken package in which such food products are packed for shipment and shipped and transported and delivered to such importer, to be unconstitutional and void as in conflict with the Commerce Clause, section 8, of Article I of the Constitution of the United States.

6. The District Court of the United States for the Western District of Wisconsin erred in holding sections 4601*g*, 4600, 4601, 4601*e*, and 4601*f*, of the statutes of the State of Wisconsin, and each of them, as applied to sales, the offering for sale or the having in possession with intent to sell within the State of Wisconsin of the food products of the plaintiff containing benzoate of soda, when such sales are made or to be made by and of the immediate containers, being the individual bottles or jars in which such food products are put up for sale and delivery commonly by retailers to consumers, and such immediate container, the individual bottle

44 or jar, being a package of such food product which has been shipped, transported and delivered into the state within and as a part of a package consisting of a wooden case containing several such individual containers packed for shipment, shipped, transported and delivered in interstate commerce, the said individual containers having been removed from said wooden case by the breaking and opening thereof, to be unconstitutional and void as in conflict with the Act of Congress known as the Food and Drugs

Act of June 30, 1906; and as in conflict with the Commerce Clause, section 8 of Article I of the Constitution of the United States.

7. The District Court of the United States for the Western District of Wisconsin erred in holding sections 4601g, 4600, 4601, and 4601f of the statutes of the State of Wisconsin, and each of them, as applied to sales, the offering for sale or the having in possession with intent to sell within the State of Wisconsin of the food products of the plaintiff containing benzoate of soda, when such sales are made or to be made by restaurant keepers or hotel keepers in the State of Wisconsin by furnishing said food products to their patrons for consumption at their dining tables or stands, said food products being furnished or served and sold in the opened or broken immediate container thereof, to wit, the individual bottle or jar, to be unconstitutional and void as in conflict with the Act of Congress known as the Food and Drugs Act of June 30, 1906, and as in conflict with the Commerce Clause, section 8 of Article I of the Constitution of the United States.

8. The District Court of the United States for the Western District of Wisconsin erred in making, filing and entering its decree herein whereby it permanently enjoined the defendant, George J.

Weigle, his agents, inspectors and employes and all persons acting under his direction or at his instance, including all district attorneys of the State of Wisconsin who may seek to enforce any of said statutes of the State of Wisconsin, or any of them, from bringing or threatening to bring any prosecution or making or threatening to make any complaint as a basis for a prosecution for the enforcement of said statutes, or either of them, insofar as the same may be construed to prohibit the sale, the offering or exposing for sale or the having in possession with intent to sell plaintiff's food products containing benzoate of soda which have been sold and brought into the state from another state, and which have been or are being sold, offered or exposed for sale or had in possession with intent to sell within the State of Wisconsin other than by the importer thereof and in the unbroken package in which such food products are packed for shipment and shipped and transported and delivered to such importer.

9. The District Court of the United States for the Western District of Wisconsin erred in making, filing and entering its decree herein whereby it permanently enjoined the defendant, George J. Weigle, his agents, inspectors and employes and all persons acting under his direction or at his instance, including all district attorneys of the State of Wisconsin who may seek to enforce any of said statutes of the State of Wisconsin, or any of them, from bringing or threatening to bring any prosecution or making or threatening to make any complaint as a basis for a prosecution for the enforcement of said statutes, or either of them, insofar as the same may be construed to prohibit the sale, the offering or exposing for sale or the having in possession with intent to sell plaintiff's food products containing benzoate of soda which have been sold and brought into the state from another state, and which have been or

46 are being sold, offered or exposed for sale or had in possession with intent to sell within the State of Wisconsin and by the immediate container, being the individual bottles or jars in which such food products are put up for sale and delivery and are sold and delivered commonly by retailers to consumers, such immediate container, the individual bottle or jar, being a package of such food product which has been shipped, transported and delivered into the state within and as a part of a package consisting of a wooden case containing several such individual containers packed for shipment, shipped, transported and delivered in interstate commerce, the said individual container having been removed from said wooden case by breaking and opening the same.

10. The District Court of the United States for the Western District of Wisconsin erred in making, filing and entering its decree herein whereby it permanently enjoined the defendant, George J. Weigle, his agents, inspectors and employes and all persons acting under his direction or at his instance, including all district attorneys of the State of Wisconsin who may seek to enforce any of said statutes of the State of Wisconsin, or any of them, from bringing or threatening to bring any prosecution or making or threatening to make any complaint as a basis for a prosecution for the enforcement of said statutes, or either of them, insofar as the same may be construed to prohibit the sale, the offering or exposing for sale or having in possession with intent to sell plaintiff's food products containing benzoate of soda within the State of Wisconsin when such sale is made or to be made by restaurant keepers or hotel keepers by furnishing or serving plaintiff's said food products
47 to their patrons at their dining tables or stands in the opened or broken immediate container, individual bottle or jar aforesaid.

For which errors the appellant, George J. Weigle, prays that the said judgment and decree of the District Court of the United States for the Western District of Wisconsin filed November 23, 1916, be reversed and a judgment rendered in favor of the appellant and for costs.

WALTER C. OWEN,
*Attorney General of the
State of Wisconsin.*

WALTER, DREW,
*Deputy Attorney General of the State of Wisconsin.
Solicitors for Appellant, State Capitol, Madison, Wisconsin.*

Read on application for appeal November 29, 1916.

A. L. SANBORN,
District Judge.

Endorsed: 42-E C. Dk. In the Supreme Court of the United States. George J. Weigle, appellant, v. Curtice Brothers Co., appellee. Assignment of errors. Prayer for reversal. Filed Nov. 29, 1916. F. W. Oakley, Clerk.

48 Afterwards, towit, Nov. 29, 1916, filed appeal bond and approval as follows:

In the District Court of the United States, Western District of Wisconsin.

GEORGE J. WEIGLE, Appellant,
v.
CURTICE BROTHERS Co., Appellee.

(Bond.)

Know all men by these presents that we, George J. Weigle, Dairy and Food Commissioner of the State of Wisconsin, of Madison, Wisconsin, as principal, and the United States Fidelity & Guaranty Company, a corporation, organized and doing business under the laws of the State of Maryland, of Baltimore, Maryland, as surety, are held and firmly bound unto the above named Curtice Brothers Co., a corporation organized and doing business under the laws of the State of New York, of Rochester, New York, in the sum of Five Hundred Dollars to be paid to said Curtice Brothers Co. for the payment of which well and truly to be made we bind ourselves and each of us our and each of our heirs, executors and administrators, jointly and firmly by these presents. Sealed with our seals, and dated the 29th day of November, in the Year of our Lord, One Thousand Nine Hundred and Sixteen.

Whereas the above named George J. Weigle has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the action in the District Court of the United States for the Western District of Wisconsin, wherein said Curtice
49 Brothers Co. is plaintiff and said George J. Weigle is defendant;

Now, therefore, the condition of this obligation is such that if the above named George J. Weigle shall prosecute said appeal to effect and answer all damages and costs, if he shall fail to make appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

GEORGE J. WEIGLE. [SEAL.]

UNITED STATES FIDELITY &

GUARANTY CO. [SEAL.]

By C. F. LAMB,

Attorney in Fact.

Approved this 29th day of November, A. D. 1916.

A. L. SANBORN,

District Judge.

Endorsed: 42-E. C. Dk. In the District Court of the United States for the Western District of Wisconsin. George J. Weigle, appellant, v. Curtice Brothers Co., appellee. Bond. Filed Nov. 29, 1916. F. W. Oakley, Clerk.

50 Afterwards, towit, Dec. 8, 1916, filed præcipe as follows

In the District Court of the United States Western District of Wisconsin.

CURTICE BROTHERS Co., Plaintiff,

v.

GEORGE J. WEIGLE, Defendant.

(*Præcipe.*)

To the Clerk of the District Court of the United States for the Western District of Wisconsin:

You will please prepare a transcript of the following papers constituting the record filed in the above entitled action in your office in the District Court of the United States for the Western District of Wisconsin, to wit:

1. Bill in Equity.
2. Subpæna.
3. Motion to dismiss bill.
4. Order denying motion to dismiss.
5. Opinion of Hon. A. L. Sanborn, District Judge, dated October 30, 1916.

6. Decree in Equity.
7. Petition for appeal and allowance.
8. Assignment of errors and prayer for reversal.
9. Appeal bond and approval.
10. Præcipe for transcript of record.
11. Clerk's certificate.
12. Citation and service.

and transmit the same to the Clerk of the Supreme Court of the United States together with the appeal papers for the use of
51 said court in the trial of the appeal herein.

WALTER C. OWEN,

Attorney General of the State of Wisconsin.

WALTER DREW,

Deputy Attorney General of the State of Wisconsin.

Solicitors for Defendant.

Due and personal service of the within præcipe is admitted this 2nd day of Dec., 1916, and it is stipulated that the papers mentioned therein are all of the papers a transcript of which is required for the use of the Supreme Court of the United States in the determination of the questions raised or to be raised and determined upon the trial of the appeal herein.

H. O. FAIRCHILD,

Solicitor for Plaintiff.

Endorsed: 42-E C. Dk. In the District Court of the United States. Western District of Wisconsin. Curtice Brothers Co., plaintiff, vs. George J. Weigle, defendant. Præcipe. Filed Dec. 8, 1916. F. W. Oakley, Clerk.

52 UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

I, F. W. Oakley, Clerk of the District Court of the United States for said District, do hereby certify that I have compared the foregoing transcript of record with the original records of this Court now remaining of record in my office in the case therein lately pending of Curtice Brothers Co., plaintiff, vs. George J. Weigle, defendant, and the same is a correct transcript therefrom.

I further certify that the citation therein with admission of service thereon hereto annexed is the original citation and admission of service granted in said cause.

In testimony whereby I have hereunto set my hand and duly affixed the seal of said Court at the city of Madison in the said Western District of Wisconsin this 9th day of December, in the year of our Lord one thousand nine hundred and sixteen and of the Independence of the said United States the one hundred and forty-first.

[Seal U. S. District Court, Western Dist. of Wisconsin, Madison.]

F. W. OAKLEY, *Clerk.*
By FRED W. FRENCH, *Deputy.*

53 In the Supreme Court of the United States.

GEORGE J. WEIGLE, Appellant,
v.
CURTICE BROTHERS Co., Appellee.
(*Citation.*)

THE UNITED STATES OF AMERICA, *ss:*

To Curtice Brothers Co., Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, on the 26th day of December, 1916, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Western District of Wisconsin, wherein George J. Weigle is appellant and Curtice Brothers Co. is appellee, to show cause, if any there be, why the judgment and decree in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness, Honorable Edward Douglass White, Chief Justice of the United States, this 29th day of November, in the year of our Lord One Thousand Nine Hundred and Sixteen.

A. L. SANBORN,
District Judge.

54 [Endorsed:] 42-E. C. Dk. In the Supreme Court of the United States. George J. Weigle, Appellant, v. Curtice Brothers Co., Appellee. Citation. Due and personal service of the within Citation admitted this 2 day of Dec., 1916. H. O. Fairchild, Solicitor for Appellee. Filed Dec. 8, 1916. F. W. Oakley, Clerk.

55 In the Supreme Court of the United States.

GEORGE J. WEIGLE, Appellant,
v.
CURTICE BROTHERS Co., Appellee.

(Stipulation for Printing Record.)

It is stipulated and agreed by and between W. C. Owen, Attorney General of the State of Wisconsin, and Walter Drew, Deputy Attorney General of the State of Wisconsin, solicitors for appellant, and H. O. Fairchild, solicitor for appellee, that the following portions of the record, the same being sufficient to show the errors complained of and no more, shall be printed, to wit:

1. Bill of Equity.
2. Subpœna.
3. Motion to dismiss bill.
4. Order denying motion to dismiss.
5. Opinion of Hon. A. L. Sanborn, District Judge, dated October 30, 1916.
6. Decree in Equity.
7. Petition for appeal and allowance.
8. Assignment of errors and prayer for reversal.
9. Appeal bond and approval.
10. Præcipe for transcript of record.
11. Clerk's certificate.
12. Citation and service.

It is further stipulated and agreed that if, from oversight or omission, any part of the record be not thus printed that the appellant has the right to print or may be required by appellee to print any further or additional portions thereof.

Dated Dec. 2nd, 1916.

WALTER C. OWEN,
Attorney General of the State of Wisconsin.

WALTER DREW,
*Deputy Attorney General of the State of Wisconsin,
Solicitors for Appellant.*

H. O. FAIRCHILD,
Solicitor for Appellee.

57 [Endorsed:] 823/25,653. In the Supreme Court of the United States. George J. Weigle, Appellant, v. Curtice Brothers Co., Appellee. Stipulation for Printing Record.

58 [Endorsed:] File No. 25,653. Supreme Court U. S., October Term, 1916. Term No. 823. Geo. J. Weigle, App't, vs. Curtice Bros. Co. Stipulation as to parts of record to be printed. Filed Dec. 15, 1916.

Endorsed on cover: File No. 25,653. W. Wisconsin, D. C. U. S. Term No. 823. George J. Weigle, appellant, vs. Curtice Brothers Co. Filed December 15, 1916. File No. 25,653.

Supplement to the

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OF THE

REPORT OF THE

COMMISSIONER OF THE

LAND OFFICE

FOR THE YEAR 1887

WASHINGTON: 1888

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IN THE
Supreme Court of the United States

October Term, 1916.

No. 823

GEORGE J. WEIGLE,

Appellant,

v.

CURTICE BROTHERS COMPANY,

Appellee.

**Appeal from the District Court of the United States
For the Western District of Wisconsin.**

BRIEF OF APPELLANT

STATEMENT

This is an appeal from a decree of the district court of the United States for the western district of Wisconsin. The appellant (defendant in the court below) moved to dismiss the complaint of the appellee for want of equity, on the ground that it failed to state facts sufficient to entitle the appellee to relief. The court denied the motion and directed that the appellee have a decree in accordance with its bill, but with leave to the appellant to answer. (Transcript, p. 16.) The appellant declined further to answer the bill of complaint, and a decree in accordance with its prayer was duly entered. (Transcript, pp. 18-20.)

NATURE OF THE ACTION

The action was brought to have certain statutes of the state of Wisconsin declared invalid and unenforceable, under the provisions of the Pure Food and Drugs Act of congress and the Commerce Clause of the federal constitution, as applied to appellee's business, and to restrain the appellant, who is dairy and food commissioner of the state of Wisconsin, from enforcing said sections or interfering with the business of the appellee in the state of Wisconsin, under or pursuant to the authority which said statutes vest in him.

The statutes thus challenged forbid adulteration of foods and drugs sold in the state of Wisconsin, define the terms "food," "drug" and "adulteration," forbid the sale of foods containing certain specified preservatives, substances or compounds, "or other preservatives injurious to health," and specifically forbid the use of benzoic acid or benzoates in such foods, except where so used as to make possible their removal before the food is consumed. Ordinary penalties for violation of these statutes are provided. The text of the statutes appears in full at pages 5-7, *infra*; this statement is not inclusive of all of their terms.

The bill of complaint alleges that the appellee manufactures in the state of New York and ships into and sells in the state of Wisconsin, through jobbers and retailers, food products containing benzoate of soda; that congress by the Pure Food and Drugs Act has assumed authority necessarily exclusive of that of the state of Wisconsin to determine whether or not benzoate of soda is harmful; that the secretary of agriculture, under authority conferred by Act of Congress Public

No. 382 (approved June 30, 1906), and the secretaries of the treasury, of commerce and labor and of agriculture, under authority conferred upon them by sec. 3 of the Pure Food and Drugs Act, have determined benzoate of soda to be harmless; that such determination excludes the right of the state of Wisconsin under its police power to determine otherwise as to sales within the state; and that these decisions of the federal departments, together with the acts of congress in question, entitle the appellee to have its product sold freely in the internal commerce of the state of Wisconsin, without interference or restrictions to be imposed by the state to preserve the health of its citizens.

The appellant in open court disavowed any claim that any one of the statutes challenged covered or was intended to cover or in any manner affect the right of an importer of any of appellee's products to have possession of, expose for sale or sell such products at wholesale or retail, in the unbroken wooden package enclosing immediate containers, in which they are shipped into the state of Wisconsin. The decree directed that this disavowal be regarded as taking out of the case the subject matter thereof. (Transcript, p. 18.)

THE BILL OF COMPLAINT IN DETAIL

The bill of complaint (Transcript, pp. 1-14) contains the following material allegations of fact:

(1) That the appellee, a corporation and citizen of the state of New York, is and for many years has been a manufacturer, at the city of Rochester in that state, of various food products and condiments, including ketchup, jellies, jams, preserves, mincemeat, chili sauce

and sweet pickled peaches and pears; and has built up a large business. That these food products are put up for sale in glass bottles or jars of various sizes to satisfy the demands of the trade; and that such containers are labeled and in other respects made to comply with the requirements of the Pure Food and Drugs Act of Congress of June 30, 1906, and the amendments thereof and the rules and regulations duly promulgated thereunder. Large quantities of these food products are sold and shipped in interstate commerce to jobbers and retailers throughout the United States, including the state of Wisconsin, the immediate glass containers being packed for shipment in wooden cases containing a number of containers. When these cases are sold to the retailer in the state of Wisconsin in the usual course of trade, whether directly by the appellee, or through a jobber within or without the state, the individual glass containers are removed from the wooden case by the retailer, and sold to the various retail purchasers, who either consume such products themselves or, in the case of restaurant or hotel keepers, serve them in the bottles or jars to guests at their tables for consumption.

(2) In the preparation of fruit for the manufacture of the appellee's products it becomes desirable to add a small percentage of benzoate of soda to such products as a preservative. The appellee uses benzoate of soda in said products accordingly, but labels each immediate container of such food products so as to indicate plainly the presence and amount of benzoate of soda therein. Prior to 1902, when appellee began this use of benzoate of soda, it consulted scientists as to the effect of benzoate of soda upon health when used in the aforesaid manner, and was advised that it was not harmful when used in food products. Appellee, in reliance upon this

advice, began and has since continued its present use of benzoate of soda.

(3) The following determinations of the federal departments require the court to take judicial notice that benzoate of soda is not harmful to health.

(a) The secretary of agriculture, under authority of the act of congress of the United States Public No. 382, approved June 30, 1906, determined that benzoate of soda mixed with foods is not injurious to health.

(b) The secretaries of the treasury, of commerce and labor, and of agriculture, pursuant to sec. 3 of the Pure Food and Drug Act of June 30, 1906, made and promulgated on March 3, 1909, for the purpose of carrying out the provisions of said act, what is known as "Food Inspection Decision 104"; and thereafter on April 10, 1913, adopted Regulation No. 15 of the "Rules and Regulations for the Enforcement of the Food and Drugs Act," to the effect that, since benzoate of soda when used in foods as a preservative was harmless, such use would be permitted provided the food container was so labeled as to show the presence and amount of such component. (See p. 138 *infra*, for full text.)

(4) Prior to the passage of the statutes hereinafter referred to, appellee sold and shipped in interstate commerce into Wisconsin annually many thousand dollars worth of its food products (except chili sauce) and earned large profits from such business. The legislature of Wisconsin, however, enacted at various dates between 1905 and 1911, the following statutory provisions, all of which are now in force, and which are all included in a chapter of the Wisconsin statutes designated "Offenses Against the Public Health":

(a) Sec. 4601g, which (so far as it is material) reads as follows:

“Benzoic acid; sale of foods, containing. It shall be unlawful to sell, offer or expose for sale or have in possession with intent to sell for use or consumption in this state, any article of food as defined in section 4600 of the statutes, which contains added benzoic acid or benzoates; provided, that when in the preparation of food products for shipment they are preserved by any external application of benzoic acid or benzoates in such a manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this section shall be construed as applying only when said products are ready for consumption.

“Penalty. Any person who, by himself, his servant or agent, or as the servant or agent of any other person, or as the servant or agent of any firm or corporation, shall violate any of the provisions of this section shall upon conviction thereof be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars or by imprisonment in the county jail not less than thirty days nor more than sixty days.”

(b) Sec. 4600, which reads in part as follows:

“The term ‘food,’ as used herein shall include all articles used for food or drink or condiment by man, whether simple, mixed or compound, and all articles used or intended for use as ingredients in the composition thereof or in the preparation thereof. • • •

“Any person who shall, by himself, his servant or agent, or as the servant or agent of any other person, sell, exchange, deliver or have in his possession, with intent to sell, exchange, offer for sale or exchange, any • • • article of food which is adulterated, • • • shall be fined not less than twenty-five dollars, nor more than one hundred dollars, or be imprisoned in the county jail not less than thirty days nor more than four months.”

(c) Sec. 4601, which provides in part as follows:

“An article shall be deemed to be adulterated within the meaning of the preceding (4600) section:

“ * * *

“In the case of food: * * * if it contains any added substance or ingredient which is poisonous, injurious or deleterious to health, or any deleterious substance not a necessary ingredient in its manufacture; * * *.”

(d) Secs. 4601e and 4601f, which provide in part as follows:

“Section 4601e. No person, firm or corporation shall, by himself, or by his agents or servants, manufacture, sell, ship, consign, offer for sale, expose for sale, or have in his possession with intent to sell for use or consumption within the state, any article of food within the meaning of section 4600 of the statutes, which contains formaldehyde, * * * boric acid or borates, * * * or any other preservatives injurious to health.

“Section 4601f. Every person, firm or corporation and every officer, agent, servant or employee of such person, firm or corporation who violates any of the provisions of section 4601e shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than twenty-five nor more than one hundred dollars, or be imprisoned in the county jail not less than thirty days nor more than sixty days.”

(5) In the summer and autumn of 1915, appellee again commenced the shipment and sale of its food products in Wisconsin, and conducted a large and profitable business until compelled to desist, as hereinafter set forth. The appellant was and is the duly appointed and acting dairy and food commissioner of Wisconsin, and required, as such officer, to enforce all statutes of the state relative to the manufacture and sale within its

borders of food products, and to investigate, through his agents, inspectors and employes, the composition of articles of food sold, shipped, consigned, offered or exposed for sale, and held for purposes of sale, for use or consumption within the state, in order to determine whether such foods are adulterated within the meaning of the foregoing state statutes; and if found to be so adulterated, to institute prosecutions against all persons guilty of violating such statutes.

(6) The agents, inspectors and employes of the appellant, claiming to be acting under his directions and to be performing their duties under the state statutes, visited repeatedly the places of business of retail dealers in Wisconsin who had purchased appellee's food products from it in interstate commerce, or from jobbers in Wisconsin or other states, who had, in turn, purchased from appellee its food products by the case in interstate commerce, and warned said retail dealers that the sale of said food product in the individual containers to consumers, or the possession of said food products for the purpose of such sale, were violations of the Wisconsin statutes because said food products contained benzoate of soda, and that said dealers would be prosecuted and punished if they sold said food products. The agents, inspectors and employes of the appellant also visited restaurant and hotel keepers who were serving appellee's food products to guests, and made similar statements and threats under similar circumstances. That the appellant approves of these acts of his agents, inspectors and employes; that he publicly declares that the aforesaid state statutes are as applicable to appellee's food products, although shipped into the state in interstate commerce for resale therein to consumers, on such resale, in the individual containers or on being

furnished by restaurant or hotel keepers therein to guests at their tables, as though said products had originated in Wisconsin.

(7) Appellee alleges that none of the aforesaid statutes has any application to the sale or use of its food products in Wisconsin in the manner aforesaid; but that the question of the legality of such internal commerce and the question of whether its food products used therein are adulterated because of the addition of benzoate of soda as preservative are matters within the exclusive jurisdiction of the federal court and determinable by them under the provisions of the Pure Food and Drugs Act and the aforesaid determinations and regulations promulgated thereunder; that the state statutes are in violation of appellee's rights under the Pure Food and Drugs Act and under sec. 8, art. I of the constitution of the United States; and that the acts of the appellant and his agents, inspectors and employees under said statutes are without jurisdiction and void.

(8) The aforesaid declared purpose and threats and conduct of appellant and of his agents, inspectors and employees, have resulted and will result in irreparable and continuing injury to the appellee in respect to its business interests, which injury is not compensable in damages; and that the enforcement by appellee of the state statutes in the manner threatened will result in a multiplicity of prosecutions, greatly harassing the dealers involved.

(9) Appellee prays that the several state statutes and parts of statutes specifically referred to be held invalid under the Pure Food and Drugs Act and the Commerce Clause of the federal constitution as applied to the business actually being conducted by appellee in Wisconsin as above described, so long as its said food

products remain in the several immediate containers, even though such containers may have been opened by a hotel or restaurant keeper for the use of a guest; also that the appellant and all persons acting under his direction be permanently restrained from bringing or threatening to bring any prosecutions under said state statutes based upon the business conducted as aforesaid by appellee in Wisconsin, or any phase thereof, or from declaring or in any wise intimating to jobbers, dealers, or restaurant keepers, purchasing, handling or selling appellee's products that their actions in so doing are illegal because in violation of said state statutes or any of them.

THE DECISION OF THE TRIAL COURT

The appellant having moved to dismiss this bill for want of equity (Transcript, p. 15), the trial court denied the motion and ordered that the appellee have a decree in accordance with its bill, but with the usual leave to the appellant to answer. (Transcript, p. 16.) The trial judge filed a very brief written opinion, in which he recognizes "the great difficulty of the questions raised," and bases his decision upon a determination that the Pure Food and Drugs Act, as interpreted in the case of *McDermott v. Wisconsin*, 228 U. S. 115, and applied by the several determinations of the three secretaries, makes the immediate container as well as the larger package of interstate shipment the package of interstate commerce, and that therefore the state has no power to prevent the sale of such immediate containers, even in the internal commerce of the state. (Transcript, p. 17.)

The appellant having declined further to answer the bill, a decree was entered which followed substantially the prayer of the bill (see pp. 9-10, *supra*), declaring the state statutes in question invalid as applied to any and all sales of appellee's product in Wisconsin so long as such product remained in the immediate containers, and covering cases where restaurant or hotel keepers within said state furnish such product to guests at their tables; also restraining the appellant from enforcing or threatening to enforce said state statutes in such a way as to interfere with the aforesaid business of appellee. (Transcript, p. 18-20.) From this decree the appellant prosecuted this appeal. (Transcript, p. 21.)

Prior to the entry of this decree, the appellant in open court disavowed

"any claim on his part that either of the statutes of the state of Wisconsin mentioned in the bill of complaint, to wit, sections 4601g, 4600, 4601, 4601e or 4601f, Wisconsin Statutes, covers or is intended to cover, or in any manner affect sales, offers or exposures for sale, or having in possession with intent to sell, by the importer into the state, in the unbroken outer wooden package enclosing immediate containers, to wit, bottles or jars, in which they are shipped into said state, any of plaintiff's food products, either at wholesale or retail, for use or consumption in the state of Wisconsin." (Transcript, p. 18.)

Regarding this disavowal the decree provided:

"that the disavowal aforesaid on the part of the defendant is regarded by the court as taking out of the case the subject matter of such disavowal." (Transcript, p. 18.)

ERRORS ASSIGNED AND RELIED UPON

A condensed statement of the errors assigned and relied upon is given at page 16, *infra*. The full text of such assignment of errors is as follows:

“1. The District Court of the United States for the Western District of Wisconsin erred in refusing to dismiss the bill in the action below for the reason and upon the ground that the plaintiff did not in and by its said bill make or state such a case as entitled it in a court of equity to any relief against the defendant.

“2. The District Court of the United States for the Western District of Wisconsin erred in denying the defendant's motion to dismiss the bill in the action below for the same reason.

“3. The District Court of the United States for the Western District of Wisconsin erred in rendering its decree in the action below in favor of the plaintiff and against the defendant.

“4. The District Court of the United States for the Western District of Wisconsin erred in holding sections 4601g, 4600, 4601, 4601e, and 4601f, of the statutes of the State of Wisconsin, and each of them, as applied to sales, the offering for sale or the having in possession with intent to sell within the State of Wisconsin of the food products of the plaintiff containing benzoate of soda, when such sales are made or to be made other than by the importer thereof and in the unbroken package in which such food products are packed for shipment and shipped and transported and delivered to such importer, to be unconstitutional and void as in conflict with the Act of Congress known as the Food and Drugs Act of June 30, 1906.

“5. The District Court of the United States for the Western District of Wisconsin erred in holding sections 4601g, 4600, 4601, 4601e, and 4601f of the statutes of the State of Wisconsin, and each of them, as applied to sales, the offering for sale or

the having in possession with intent to sell within the State of Wisconsin of the food products of the plaintiff containing benzoate of soda, when such sales are made other than by the importer thereof and in the unbroken package in which such food products are packed for shipment and shipped and transported and delivered to such importer, to be unconstitutional and void as in conflict with the Commerce Clause, section 8, of Article I of the Constitution of the United States.

"6. The District Court of the United States for the Western District of Wisconsin erred in holding sections 4601g, 4600, 4601, 4601e, and 4601f of the statutes of the State of Wisconsin, and each of them, as applied to sales, the offering for sale or the having in possession with intent to sell within the State of Wisconsin of the food products of the plaintiff containing benzoate of soda, when such sales are made or to be made by and of the immediate containers, being the individual bottles or jars in which such food products are put up for sale and delivery commonly by retailers to consumers, and such immediate container, the individual bottle or jar, being a package of such food product which has been shipped, transported and delivered into the state within and as a part of a package consisting of a wooden case containing several such individual containers packed for shipment, shipped, transported and delivered in interstate commerce, the said individual containers having been removed from said wooden case by the breaking and opening thereof, to be unconstitutional and void as in conflict with the Act of Congress known as the Food and Drugs Act of June 30, 1906; and as in conflict with the Commerce Clause, section 8 of Article I of the Constitution of the United States.

"7. The District Court of the United States for the Western District of Wisconsin erred in holding sections 4601g, 4600, 4601, and 4601f of the statutes of the State of Wisconsin, and each of them, as applied to sales, the offering for sale or the having in possession with intent to sell within the State of Wisconsin of the food products of the plaintiff con-

taining benzoate of soda, when such sales are made or to be made by restaurant keepers or hotel keepers in the State of Wisconsin by furnishing said food products to their patrons for consumption at their dining tables or stands, said food products being furnished or served and sold in the opened or broken immediate container thereof, to wit, the individual bottle or jar, to be unconstitutional and void as in conflict with the Act of Congress known as the Food and Drugs Act of June 30, 1906, and as in conflict with the Commerce Clause, section 8 of Article I of the Constitution of the United States.

"8. The District Court of the United States for the Western District of Wisconsin erred in making, filing and entering its decree herein whereby it permanently enjoined the defendant, George J. Weigle, his agents, inspectors and employes and all persons acting under his direction or at his instance, including all district attorneys of the State of Wisconsin who may seek to enforce any of said statutes of the State of Wisconsin, or any of them, from bringing or threatening to bring any prosecution or making or threatening to make any complaint as a basis for a prosecution for the enforcement of said statutes, or either of them, in so far as the same may be construed to prohibit the sale, the offering or exposing for sale or the having in possession with intent to sell plaintiff's food products containing benzoate of soda which have been sold and brought into the state from another state, and which have been or are being sold, offered or exposed for sale or had in possession with intent to sell within the State of Wisconsin other than by the importer thereof and in the unbroken package in which such food products are packed for shipment and shipped and transported and delivered to such importer.

"9. The District Court of the United States for the Western District of Wisconsin erred in making, filing and entering its decree herein whereby it permanently enjoined the defendant, George J. Weigle, his agents, inspectors and employes and all persons acting under his direction or at his instance, including all district attorneys of the State of Wisconsin

who may seek to enforce any of said statutes of the State of Wisconsin, or any of them, from bringing or threatening to bring any prosecution or making or threatening to make any complaint as a basis for a prosecution for the enforcement of said statutes, or either of them, in so far as the same may be construed to prohibit the sale, the offering or exposing for sale or the having in possession with intent to sell plaintiff's food products containing benzoate of soda which have been sold and brought into the state from another state, and which have been or are being sold, offered or exposed for sale or had in possession with intent to sell within the State of Wisconsin and by the immediate container, being the individual bottles or jars in which such food products are put up for sale and delivery and are sold and delivered commonly by retailers to consumers, such immediate container, the individual bottle or jar, being a package of such food product which has been shipped, transported and delivered into the state within and as a part of a package consisting of a wooden case containing several such individual containers packed for shipment, shipped, transported and delivered in interstate commerce, the said individual container having been removed from said wooden case by breaking and opening the same.

"10. The District Court of the United States for the Western District of Wisconsin erred in making, filing and entering its decree herein whereby it permanently enjoined the defendant, George J. Weigle, his agents, inspectors and employes and all persons acting under his direction or at his instance, including all district attorneys of the State of Wisconsin who may seek to enforce any of said statutes of the State of Wisconsin, or any of them, from bringing or threatening to bring any prosecution or making or threatening to make any complaint as a basis for a prosecution for the enforcement of said statutes, or either of them, in so far as the same may be construed to prohibit the sale, the offering or exposing for sale or having in possession with intent to sell plaintiff's food products containing benzoate of soda within the State of Wisconsin when such sale

is made or to be made by restaurant keepers or hotel keepers by furnishing or serving plaintiff's said food products to their patrons at their dining tables or stands in the opened or broken immediate container, individual bottle or jar aforesaid." (Transcript, pp. 21-24.)

CONDENSED STATEMENT OF ERRORS ASSIGNED AND RELIED UPON.

The district court erred:

(1) In refusing to determine that the bill of complaint failed to state a case entitling the plaintiff to any relief in a court of equity, and in refusing to dismiss the bill because of such failure, pursuant to defendant's motion. (Errors 1 and 2.)

(2) In rendering a decree in favor of ~~defendant~~ ^{plaintiff}. (Error 3.)

(3) In holding the state statutes challenged, as applied to the sale (or offering or having in possession with intent to sell) of plaintiff's products containing benzoate of soda, were unconstitutional and void under the Commerce Clause of the federal constitution when applied

(a) To sales made (or to be made) in Wisconsin other than by the importer and in the original package. (Errors 4 and 5.)

(b) To sales made (or to be made) in Wisconsin of the immediate containers of the product, after removal from the original package of shipment, and especially to such sales by restaurant or hotel keepers to their patrons. (Errors 6 and 7.)

(4) In enjoining the defendant and those acting under him from enforcing the state statutes in each of the several situations referred to in the preceding paragraph, in respect to which they were declared unconstitutional and void. (Errors 8, 9 and 10.)

OUTLINE OF ARGUMENT

The argument in support of this appeal can be more logically presented under the several points hereinafter set forth than by way of any separate consideration of the several errors assigned and relied upon. It will be thus presented, and each of the several errors assigned will be found supported in the course of such presentation of the argument.

I

The position assumed by the appellee in the bill of complaint is that congress has occupied the field of regulation of food and drugs shipped in interstate commerce, so long as they remain in the immediate containers, to the entire exclusion of the right of the state to legislate on the subject, even as to sales made in the internal commerce of the state. This theory was apparently accepted and applied in the decree of the trial court.

II

This construction of the Food and Drugs Act will not be adopted, since it would render the act (in part, at least) void; for the act, thus construed, would unconstitutionally invade the right of the state to regulate its internal affairs.

1. This construction would deprive the state of all power of regulation over food and drugs shipped into the state in interstate commerce, and would thus limit

its control over those articles to food and drugs which were produced within the state.

2. An attempt by congress to deprive the state of the right to exercise its police power over goods received through the channels of interstate commerce, after such goods have entered the mass of property in the state, must be declared unconstitutional.

(1) *The police power remains with the states as an inherent attribute.*

(2) *The states, in delegating to the federal government the power to regulate interstate commerce, did not thereby surrender or impair their plenary police power in their purely internal affairs.*

3. Courts will not so construe a statute as to render it unconstitutional when there is another reasonable interpretation.

III

The Food and Drugs Act, rightly construed, does not attempt to assert control over the product after it has become a subject of the internal commerce of the state.

1. The text of the act, considered wholly apart from the authorities interpreting it, shows conclusively that congress intended to leave to the state an extensive field of regulation and control over food and drugs coming into the state through the channels of interstate commerce.

(1) *Section 2 of the Food and Drugs Act.*

(2) *Section 10 of the act.*

(3) *Other sections of the act.*

2. A consideration of the essential and dominant purpose of the Food and Drugs Act discloses a plain

purpose to limit federal control to the bounds of interstate transactions.

(1) The situation at the time the act was passed.

(2) The legislative history of the adoption of the act clearly reveals the dominant purpose leading to its adoption and the evils sought to be remedied; and in so doing it reveals as clearly an intent to make the act operative only within those limits of interstate commerce control which had theretofore been established by the "original package" decisions of this Court.

(a) The proceedings in congress, including the debates, on a measure may be resorted to in order to determine the purpose of a measure or the evils which it was designed to remedy.

(b) General statement of the proceedings before congress leading to the passage of the Food and Drugs Act.

(c) Debate in the senate.

(d) Debate in the house of representatives.

(e) Conference report adopted.

(f) Conclusions drawn from the history of the adoption of the act.

3. The terms "unbroken package" and "original, unbroken package," properly defined, limit the field of operation of the Food and Drugs Act to interstate transactions, and the courts have construed the act accordingly.

(1) These phrases, when used in relation to interstate shipment of commodities, had acquired a clearly defined meaning at the time of the enactment of the act.

(2) In adopting a definition of these phrases, there was also defined by the court a limitation

upon federal control over an interstate shipment; federal control ended and state control begun when the importer broke or sold the original package.

(3) This Court, in construing the meaning of these phrases in the act, will adopt this established meaning and the limitation of federal control therein implied, unless the act, in express terms or by unmistakable implication, requires the adoption of a different meaning.

(4) The act contains no language which requires the court to give to these phrases a meaning different than the established one; the whole text of the act justifies and requires the adoption of the settled meaning of these phrases and the limitation of federal control therein implied.

(5) The authorities interpreting the act have applied this meaning of these phrases and limited the act accordingly.

4. The practical construction and application of the act has been such as to limit its operation to the interstate shipment.

(1) Long established usage and practice under a statute, indicating a generally accepted interpretation of it, is to be given great weight in construing the statute.

(2) The entire course of administration of the act supports the construction of it which limits federal control to the period of the interstate shipment.

IV

The several state statutes challenged by the appellee constitute a legitimate exercise of the police power of the state to protect its people against impure or harmful food or drugs and against fraud or imposition in respect to their sale.

1. The effect of benzoate of soda upon health being in serious dispute, the legislature of the state had the right to make a conclusive determination on the subject, finding it to be harmful.

2. Benzoate of soda is often employed to conceal the use of inferior and unwholesome components and insanitary processes in the manufacture of food products, whereby the public is deceived as to the character or quality of the product.

3. Either the protection of the public health or the prevention of fraud and imposition furnishes ample basis for prohibiting the sale in the internal commerce of the state of food products containing benzoate of soda.

V

The state statutes challenged by appellee deal solely with the internal commerce of the state; they do not invade the field of federal regulation over interstate commerce exercised by the Food and Drugs Act, or conflict with the provisions of that act; hence they are legitimate regulations under the police power of the state and are not open to successful attack.

1. The state statutes challenged, although containing no express exception excluding from the field of

their operation transactions constituting interstate commerce, must be construed as if they contained such exception.

(1) Under the settled rule of the supreme court of Wisconsin in construing the inclusive language of state statutes similar to those here challenged, such statutes will be so construed as not to apply to interstate commerce.

(2) This Court will assume that this policy of construction will be applied by the state supreme court to the statutes challenged, and will treat them as if thus restrictively construed. And it is the settled policy of this Court to accept the construction of a state statute approved by the supreme court of the state.

2. The state statutes challenged do not conflict with the provisions of the act, nor do they attempt to occupy any portion of the field occupied by it; hence they are not invalidated by the act.

(1) An intent to supersede by federal legislation the exercise by the state of its police power as to matters not specifically covered by the federal legislation is not to be implied, unless the federal act, fairly interpreted, is in direct conflict with the law of the state.

(2) A federal statute which, by permissive language or by absence of any inclusive prohibition, recognizes an article as a legitimate subject of interstate commerce, does not thereby compel its recognition by the state as a proper subject of its internal commerce, or prohibit the state from excluding it from the channels of purely local trade.

(3) Since the state statutes challenged do not in-

terfere in any respect with the right of the appellee to ship its product into the state in interstate commerce, but simply deny to such product the facilities of the purely internal commerce of the state, they do not conflict with the federal act or interfere with its operation, but are valid police regulations.

I

ARGUMENT

The position assumed by the appellee in the bill of complaint is that congress has occupied the field of regulation of food and drugs shipped in interstate commerce, so long as they remain in the immediate containers, to the entire exclusion of the right of the state to legislate on the subject, even as to sales made in the internal commerce of the state. This theory was apparently accepted and applied in the decree of the trial court.

The bill of complaint makes the following basic assertions:

(1) The appellee manufactures in New York and ships into Wisconsin, in interstate commerce, food products containing benzoate of soda.

(2) These food products are put up at the factory in small containers, a number of which are placed in a single wooden case when so shipped into Wisconsin.

(3) After the wooden case is received by the purchaser in Wisconsin, he either resells to some other purchaser in that state the entire case, or breaks open the case and sells the immediate containers therein, to several purchasers, who either consume the product themselves or again resell one or more of such immediate containers.

(4) In many instances either whole cases or a number of single containers are purchased by hotel and

Note: Unless otherwise indicated, italics used in this brief are ours.

restaurant keepers and single bottles are placed before guests at the table.

(5) The product thus produced and shipped by appellee complies with the Federal Food and Drug Act as interpreted by the federal officials; but it does not comply with regulations imposed by the state of Wisconsin upon its sale and use within such state.

(6) Because such product thus complies with the federal act, it may be sold and resold in the state of Wisconsin and may be furnished to guests by hotel and restaurant keepers as aforesaid; and the state cannot enforce its local health laws as regards such sales or use, or interfere therewith in any way, because the federal control follows the product and protects it against state regulation, until the moment when the contents of the single bottle or jar has been removed therefrom.

The decree appealed from, interpreted in the light of the brief written decision, apparently adopts and applies these contentions in the bill.

Practically every state in the Union now has a code of so-called pure food and drug laws. In some instances the regulations embodied in such codes are practically identical with corresponding regulations under the federal system. But in very many cases the state codes differ from the federal system, or include requirements not made by such system. The several states have thus far proceeded, as respects their internal commerce, with the adoption and enforcement of laws regarding pure food and drugs, without particular reference to the character of federal enactments on the same subjects. It has been assumed that if the local statutes acted upon products only after they entered the internal commerce of the state, such statutes were not open to criticism on

the ground that their provisions did not correspond with federal regulations on the subject.

The complaint now seeks to extend the field of federal control over foods and drugs shipped into a state down to the point where the individual container is actually opened and the contents removed,—and this, for all practical purposes, means to the point where the product is actually consumed.

There is thus presented a proposition infinitely broader and vastly more important than the specific question of whether or not products containing benzoate of soda can be sold in the state of Wisconsin. The entire right of control and regulation by a state of foods and drugs coming into its borders through the channels of interstate commerce and resold therein is brought into question. If the federal act supplants the state law in this case it supersedes it in all cases of foods and drugs subject to its provisions received from another state. For manifestly the supremacy of federal control within the state field, if it exists at all, is inherent in the federal act, derived from the fact that the article entered the state field through the channels of interstate commerce, and is not dependent upon the character of the particular state statutes in question, or the fact that they happened to conflict with a departmental interpretation or application of the federal act. Such a construction of the law as appellee proposes spells a practical denial of all right of state control over foods and drugs which come into its confines through the channels of interstate commerce; and a consequent limitation of such control to those foods and drugs produced within the confines of the state.

It is the appellant's position that this startling and revolutionary contention is utterly unsound and untenable.

II

The construction of the Food and Drugs Act contended for by the appellee and applied in the decree will not be adopted since it would render the act (in part, at least) void; for the act, thus construed, would unconstitutionally invade the right of the state to regulate its internal affairs.

The discussion of this point assumes that two propositions considered elsewhere in this brief are established:

(a) That the Food and Drugs Act, as construed by appellee, would be operative upon articles which have left the channels of interstate commerce and become merged in the mass of state property.

(b) That the regulation of foods and drugs which have become part of the mass of state property and are being sold as such in the internal commerce of the state is a legitimate exercise of the police power of the state.

1. The construction contended for by the appellee, and approved by the trial court, would deprive the state of all power of regulation over foods and drugs shipped into the state in interstate commerce, and would thus limit its control to food and drugs which were produced within the state.

This point has been discussed under the preceding subdivision of this brief and requires restatement here

only by way of introduction of the proposition now under discussion.

2. An attempt by congress to deprive the state of the right to exercise its police power over goods received through the channels of interstate commerce, after such goods have entered the mass of property in the state must be declared unconstitutional.

(1) *The police power remains with the individual states as an inherent attribute.*

The decisions universally announce and support this doctrine:

Chicago Ry. Co. v. Arkansas, 219 U. S. 453;
House v. Mayes, 219 U. S. 270;
Kellar v. United States, 213 U. S. 138;
In re Rahrer, 140 U. S. 545;
Barbier v. Connolly, 113 U. S. 27;
Civil Rights Cases, 109 U. S. 3;
Patterson v. Kentucky, 97 U. S. 501;
Hannibal etc. Ry. Co. v. Husen, 95 U. S. 465;
Munn v. Illinois, 94 U. S. 113;
United States v. Cruikshank, 92 U. S. 542;
United States v. De Witt, 9 Wall. 41;
License Tax Cases, 5 Wall. 462;
Passenger Cases, 7 How. 283;
Thrulow v. Massachusetts, 5 How. 504;
Prigg v. Pennsylvania, 16 Pet. 539;
Gibbons v. Ogden, 9 Wheat. 1;
United States v. Shauver, 214 Fed. 154;
Kroschel v. Munkers, 179 Fed. 961;
Reeves v. Corning, 51 Fed. 774;
Chicago etc. Ry. Co. v. Milwaukee, 97 Wis. 418.

In the case of *House v. Mayes*, *supra*, this court said (pp. 281-282):

“There are certain fundamental principles which those cases recognize and which are not open to dispute. * * * Briefly stated, those principles are: that the government created by the federal constitution is one of enumerated powers, and cannot, by any of its agencies, exercise an authority not granted by that instrument, either in express words or by necessary implication; * * * that among the powers of the state, not surrendered—which power therefore remains with the state—is the power to so regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals, the public safety and the public health, as well as to promote the public convenience and the common good; and that it is with the state to devise the means to be employed to such ends, taking care always that the means devised do not go beyond the necessities of the case, have some real or substantial relation to the objects to be accomplished, and are not inconsistent with its own constitution or the constitution of the United States.”

(2) The states, in delegating to the federal government the power to regulate interstate commerce, did not thereby surrender or impair their plenary police power in their purely internal affairs.

It is settled law that the power of congress under the constitution to regulate commerce between states (art. I, sec. 8, clause 3) is plenary and subject to no limitations other than those prescribed by the constitution itself.

As said in the case of *Gibbons v. Ogden*, 9 Wheat. 1, 196, it is a power “complete in itself, may be exercised

to the utmost extent, and acknowledges no limitations other than are prescribed in the constitution.”

And see the late cases of:

Adams Express Co. v. Kentucky, 238 U. S. 190;

Minnesota Rate Cases, 230 U. S. 352;

Hoke v. United States, 227 U. S. 308;

Louisville etc. Ry. Co. v. Motley, 219 U. S. 467;

Northern Securities Co. v. United States, 193 U. S. 197.

(And many cases cited.)

But this power, though it is great, broad and general, is subject to the very limitation implied in its statement and in the purpose of its creation. As Chief Justice Marshall said in *Gibbons v. Ogden*, *supra* (pp. 194–195),

“It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

“Comprehensive as the word ‘among’ is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns

of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. *The completely internal commerce of a State, then, may be considered as reserved for the State itself.*”

And again in *The Daniel Ball*, 10 Wall. 557, 564, this court said:

“There is undoubtedly an internal commerce which is subject to the control of the States. The power delegated to Congress is limited to commerce ‘among the several States,’ with foreign nations and with the Indian tribes. This limitation necessarily excludes from the Federal control, commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a State and does not extend to or affect other States.”

And see

Kellar v. United States, 213 U. S. 139;

The Employers’ Liability Cases, 207 U. S. 463, 502;

Illinois etc. Ry. Co. v. McKendree, 203 U. S. 514;

Geer v. Connecticut, 161 U. S. 519, 531;

Covington etc. Bridge Co. v. Kentucky, 154 U. S. 204, 210;

Sands v. Manistee etc. Co., 123 U. S. 288, 295;

United States v. De Witt, 9 Wall. 41;

License Cases, 5 How. 504, 574.

And referring specifically to the interference by the federal government with the exercise by the state of its police power in its internal affairs, this court said in the case of *Kellar v. United States*, 213 U. S. 138, 144, 145, quoting from the case of *Covington etc. Bridge Co. v. Kentucky*, 154 U. S. 204, 209–211:

“The adjudications of this court with respect to the power of the States over the general subject of commerce are divisible into three classes: first, those in which the power of the state is exclusive; second, those in which the States may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the States cannot interfere at all.

“The *first* class, including all those wherein the states have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of the state, and while the regulations of the state may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference. * * *

“Congress has no power to interfere with police regulations relating exclusively to the internal trade of the States, *United States v. DeWitt*, 9 Wall. 41; *Patterson v. Kentucky*, 97 U. S. 501, nor can it by exacting a tax for carrying on a certain business thereby authorize such business to be carried on within the limits of a State. *License Tax Cases*, 5 Wall. 462, 470, 471.”

It has been well said that

“the same policy which authorizes the use of this power (of commerce regulation) as a shield to protect commerce from the vexatious interference of the States, forbids its employment as a sword to assail measures designed for the preservation of the public health, morals and comfort. * * * The power of Congress to regulate commerce is undoubtedly a beneficent one. The police laws of the State are equally so, and it is our duty to harmonize them.”

Cook v. Marshall County, 196 U. S. 261, 272, 273.

It therefore logically follows that if it be for the present conceded that the construction of the Food and Drugs Act contended for by appellee will extend its

operation to articles which have left the channels of interstate commerce and entered those of the internal commerce of the state, then the adoption of such construction would render the act to that extent, at least, unconstitutional. For it would be attempting to plead the commerce power of congress in justification of an act which sought to extend such power beyond the manifest limits imposed by the very language by which it was delegated, namely, commerce "among the several States."

3. Courts will not so construe a statute as to render it unconstitutional, when there is another reasonable interpretation.

This rule of construction is of course elementary.

United States v. Delaware & Hudson Co., 213
U. S. 366, 407-408 :

"It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. *Knights Templars Indemnity Co. v. Jarman*, 187 U. S. 197, 205."

Therefore, a construction of the Food and Drugs Act which would extend its operation to articles which have left the channels of interstate commerce and have become a part of the mass of state property and the subject of its purely internal commerce, will be avoided, when there is another logical construction of such act, which will make it operative only within the recognized and established limits of the interstate shipment.

III

The Food and Drugs Act, rightly construed, does not attempt to assert control over the product after it has become a subject of the internal commerce of the state.

We believe this conclusion to be inevitable from whichever of several viewpoints we may examine and test it.

1. The text of the act, considered wholly apart from the authorities interpreting it, shows conclusively that congress intended to leave to the state an extensive field of regulation and control over foods and drugs coming into the state through the channels of interstate commerce.

The sections of the Food and Drugs Act most vitally affecting this case are the second and tenth sections.

(1) Section 2 of the Food and Drugs Act.

The language of section 2 (see p. 124 Appendix for full text), read with the present controversy in mind, is most significant. The act forbidden is clearly stated (so far as the instant case is concerned) by the following words:

*“That the introduction into any State or Territory or the District of Columbia * * * from any other State or Territory or the District of Columbia of any article of food, or drugs which is adulterated or misbranded, within the meaning of this Act, is hereby prohibited.”*

It would be difficult to choose words which would more aptly describe an interstate shipment of goods.

The section now refers to the penalty following commission of the prohibited act:

“Any person *who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia* * * * *or who shall receive in any State or Territory or the District of Columbia* * * * *and, having so received, shall deliver in original unbroken packages,* * * * *or offer to deliver to any other person, any article so adulterated or misbranded within the meaning of this Act, or*

“Any person *who shall sell or offer for sale in the District of Columbia or the territories of the United States any such adulterated or misbranded food or drugs* * * * *shall be guilty of a misdemeanor,*” etc.

If the language first quoted from this section was significant, the portion now referred to is doubly so. This latter quotation is placed in two paragraphs designedly, to emphasize the distinction which the section clearly creates and defines.

The first paragraph by apt language penalizes the following acts:

(a) A shipment or delivery for shipment of the prohibited article from one state to another.

(b) The reception of the article shipped, in the state of its destination, *and* the redelivery to another person of such prohibited article *in original unbroken packages.*

This paragraph thus penalizes the person who ships or tries to ship the prohibited article into another state, and the person in the latter state who receives the article there and *introduces it into the internal commerce*

of such state by making the first transfer of it in the *unbroken package of shipment*. Thus are described in apt language and penalized the main steps in each interstate shipment of the prohibited article. And the acts penalized are only those which ordinarily occur *up to the moment when the interstate transaction is complete, and the internal commerce in the article begins*. There is no attempt to forbid or penalize any act having to do with such internal commerce.

The second paragraph quoted emphasizes this interpretation in another way: It deals solely with the District of Columbia and the territories, which are under direct federal control. Here it is not the receipt and delivery of the article shipped, in the "original unbroken package" of shipment, that is punished; the whole limitation embodied in those words is absent; and "*any person who shall sell or offer for sale*" the forbidden article is guilty under the act.

Surely there was a purpose in making this plain distinction. And the purpose is as clear as the distinction itself. The purpose was to differentiate between that class of cases where the article was under the control of congress at every step of its progress through the channels of commerce from the manufacturer to the consumer, by reason of resales after the original shipments occurring in the District of Columbia or the territories, and those cases where, by reason of an interstate shipment, the control of congress terminated at the point where such interstate shipment ceased and the article became a part of the mass of property in the state or entered into the internal commerce thereof.

In the former class of cases it was the intention of congress, in the exercise of the police power which it possesses in such territory, to forbid and to punish *any*

sale or offer of the prohibited article, even to the ultimate sale to the consumer; in the latter class of cases, it was just as plainly the intent to limit the prohibition and the punishment to those transactions only which constitute a part of the interstate transaction, as commonly defined, and to leave the control over the further course of the commodity through the channels of commerce to the individual state.

(2) *Section 10 of the Food and Drugs Act.*

We turn now to examine in a similar manner the text of section 10 of the Food and Drugs Act. This section (quoted in full at page 131 of Appendix) provides for proceedings *in rem* for the confiscation of adulterated or misbranded goods. It will be seen that its language is practically as significant as that of section 2 of the act. It provides that any article of food or drugs that is adulterated or misbranded within the meaning of the act and

"is being transported from one State, Territory, District or insular possession to another for sale or having been transported, remains unloaded, unsold, or in original, unbroken packages,

"or if it be sold or offered for sale in the District of Columbia or the Territories or insular possessions of the United States, shall be liable to be proceeded against," etc.

Again we indicate the same distinction by the division into paragraphs. The language of the first paragraph clearly depicts an interstate shipment, describing the limitations which congress has seen fit to set to the same by the words "*unloaded, unsold, or in the original, unbroken package,*" referring to the condition of the goods shipped immediately after transportation has ceased

and before the first sale of the article has occurred. If it was not the intent of congress to place this limitation upon its control, why were these words used? They are useless, and serve only to mislead, if that was not their purpose. There is no other possible limitation which could logically be adopted than this one, which is practically the dividing line established by the original package decisions. Congress had to choose between stopping where it did in cases of interstate shipments, and following the article all the way to the consumer (assuming, for the sake of argument, that it possessed the power to do the latter). There was no logical or possible third position. Confronted with that alternative it deliberately used language limiting its control to the period antedating the entry of the article into the internal commerce of the state.

The second paragraph quoted above deals with the adulterated or misbranded article, when shipped into the District of Columbia or the territories or insular possessions of the United States. In the case of such shipments, every reason exists why the federal supervision and control should follow the article shipped all the way to the consumer. For the powers of the federal government in such territory are, of course, comparable to those of the state within its limits. So the act uses apt language for that purpose. A new clause is interpolated in order to avoid the limiting effect, as regards this territory of peculiar federal control, of the immediately preceding phrase "remains unloaded, unsold, or in original, unbroken packages." There can be no possible purpose in this difference in language, except the one indicated. If the words "original, unbroken packages" described the individual container, as well as the larger case of shipment, and thus evinced an intention

to follow the article to the consumer, then the language used in the first paragraph was already as broad as it could be and there was no need to adopt other and broader language to accomplish the same result for the District of Columbia, the territories and the insular possessions.

But this is not all. Section 10 contains another and very significant provision. After the section provides for the seizure and condemnation of the adulterated or misbranded food or drug, and for the destruction or sale of the same, it proceeds as follows:

“But such goods shall not be sold in any jurisdiction *contrary to the* * * * *laws of that jurisdiction.*”

The section then provides for the giving of a bond to release the goods from the libel. This bond is required to include, among other conditions, the following:

“That such articles shall not be sold or otherwise disposed of *contrary to the* * * * *laws of any State.*”

Each of these two quoted provisions is a clear recognition of the existence in the several states of pure food and drug statutes, which are legitimately operative upon articles which have become part of the mass of state property through the channels of interstate commerce, and legitimately operative, therefore, on the very articles on which the federal act has already operated while they were subjects of interstate commerce. It is difficult to imagine any clearer recognition of the legitimate existence of two complete systems of regulation and control of foods and drugs—the former covering the period

of interstate shipment, the latter the period ensuing after the article has entered the internal commerce of the state. Thus viewed, the two systems operate not concurrently, but successively, the control of the state attaching after the federal control has ceased.

(3) *Other sections of the Food and Drugs Act.*

This distinction and consequent recognition of state authority over foods and drugs after they have ceased to be objects of interstate commerce is recognized in section 3 of the act, relating to the collection and examination by federal officers of specimens of food and drugs. (The text of this section appears in full at p. 125 of the Appendix.)

Here again "foods and drugs manufactured or offered for sale in the District of Columbia or in any Territory of the United States" are distinguished from foods and drugs "which shall be offered for sale in *unbroken packages* in any State other than that in which they shall have been respectively manufactured or produced."

On the other hand, when we refer to the provisions of sections 7 and 8 of the act, where reference is made to labels and brands, and particularly section 8, dealing with misbranding, we do not find the phrase "original unbroken package" or "original package," or its equivalent used. For here congress is dealing with regulations operative necessarily upon the immediate container of the food or drug. The terms here used are appropriate to this object; they are "bottle, box, or other container thereof" (sec. 7, "first" paragraph); "covering or package" (sec. 7, "fifth" paragraph); and "package" or "package as originally put up," (used throughout section 8). The reason for the dis-

tion is of course evident. In these latter sections congress is dealing with requirements relative to the preparation or manufacture of the article to enter the channels of interstate commerce; the language used is therefore appropriate to describe the unit of the manufactured product, the immediate container, its contents and labels. Sections 2 and 10, however, are operative, so far as interstate commerce is concerned, *on the act of transportation between states* of an article illegally manufactured (either as to the label or contents) and placed in the channels of such commerce. So these sections use the words "original, unbroken package" or "unloaded, unsold or in the original unbroken package," as aptly descriptive of the interstate transaction and thus of the field of federal control intended to be exercised.

We submit therefore that the bare language of the act shows that the construction contended for in the bill of complaint and adopted by the decree from which this appeal is taken is untenable; and we earnestly contend that the entire text of the act evinces a clear purpose to limit federal control to the interstate transaction, and to recognize the right of control by the state to attach and become effective when and where federal control ends.

2. A consideration of the essential or dominant purpose of the Food and Drugs Act discloses a plain purpose to limit federal control ^{to} of the bounds of the interstate transaction.

(1) The situation at the time the act was passed.

At the time that the Food and Drugs Act of June 30, 1906, was passed by congress, legislation of this sort,

while not as universal in the states as at present, was not new. In addition to Wisconsin, Massachusetts, Michigan, Minnesota, Vermont and some other states had adopted more or less complete codes on the subject. Furthermore, it was at the time probably the most universally agitated subject before the state legislatures for consideration. Practically at the same time that congress was passing the federal act (within the space of a very few months), at least a dozen states adopted complete food and drug acts. These facts in regard to the rapid adoption by states of this class of legislation were thoroughly appreciated by congress, while the federal act was under consideration.

This is conclusively shown and the dominant purpose and scope of the Food and Drugs Act made plain by the legislative history of the act to which reference will now be made.

(2) The legislative history of the adoption of the Food and Drugs Act clearly reveals the dominant purpose leading to its adoption and the evils sought to be remedied thereby; and in so doing it reveals as clearly an intent to make the act operative only within those limits of interstate commerce control which had heretofore been established by the "original package" decisions of this Court.

(a) The proceedings in congress, including the debates, on a measure, may be resorted to in order to determine the purpose of a measure or the evils which it was designed to remedy.

It is a well established rule, recognized alike by state and federal courts, that legislative journals, being the official records of a coördinate branch of the govern-

ment kept under requirement of law, and having an important bearing on the validity and meaning of the statute law which it is the duty of the courts to construe and enforce, will be judicially noticed by the courts.

Baker v. National City Bank, 23 Wall. 307;

Gardner v. Barney, 6 Wall. 499;

Connole v. Norfolk & W. Ry. Co., 216 Fed. 823,
825 (and cases cited);

Dane County v. Reindahl, 104 Wis. 302, 80 N. W.
438;

In re Ryan, 80 Wis. 414, 50 N. W. 187;

McDonald v. State, 80 Wis. 407, 50 N. W. 185.

This court has said that the opinions of individual legislators, expressed in debate, are unreliable guides in determining the meaning of a statute, and that on such questions it was not disposed to go beyond the reports of committees.

United States v. Trans-Missouri Freight Assn.,
166 U. S. 290, 318 (and cases cited);

*Omaha & Council Bluffs Street Ry. Co. v. Inter-
state Commerce Comm.*, 230 U. S. 324, 333;

Lapina v. Williams, 232 U. S. 78, 90.

But this Court has also said that debates in congress may be resorted to for the purpose of ascertaining the general object of the legislation proposed and the evils sought to be remedied by it.

Jennison v. Kirk, 98 U. S. 453, 459;

The Tap Line Cases, 234 U. S. 1, 27.

And this is in line with the great weight of authority:

36 Cyc. (Tit. Statutes) 1138, 1139, and cases
cited.

(b) General statement of the proceedings before congress leading to the passage of the Food and Drugs Act.

Mindful of this rule, we have examined the Congressional Record covering the entire history of the passage of the Food and Drugs Act. The result is most enlightening and wholly convincing with reference to the basic questions at issue in this case and particularly the proposition under immediate discussion.

The great contest with reference to this act and its passage, covering page after page of the Congressional Record and occupying the attention of both the senate and the house of representatives, was the old question of states' rights. The opponents of the measure, while proclaiming their warm friendship toward pure food legislation, insisted that such legislation was peculiarly an exercise of police power; that this power was wholly retained by the several states; that, as thus reserved, it included the power to stop at the boundary of the state any article of food or drugs injurious to the health of its people; that any attempt by congress, under the commerce clause, to exercise control over foods and drugs, was certain to constitute an invasion of the police power of the state, and would therefore be unconstitutional if enacted.

The proponents of the measure in both houses freely conceded the plenary power of the several states to legislate for the protection of the health of their citizens and freely admitted that congress possessed no police power exercisable as such within the states. They insisted, however, that congress, being possessed of the exclusive power to regulate commerce between states (a power which no state could impair by any local legislation), could close the channels of such commerce against

deleterious foods and drugs. They pointed out that while many states already had pure food and drug laws, such laws were inadequate and inefficient in operation, because of their powerlessness to exclude from the several states articles sent across the state boundary lines in interstate commerce; that it was the primary purpose of this federal legislation—a purpose which involved the performance of an actual duty owed by the federal government to the people of the several states—to supply this deficiency—to supplement the state laws already in force by a national act which would operate efficiently in a field which the states were powerless to regulate, the field of interstate commerce, thereby attacking the evil at its source; that there was no danger of invasion through the act of the peculiar field of state regulation, under its police power, *because the dividing line between federal and state control of articles of interstate commerce had already been clearly defined* by a long line of decisions of this Court, asserting the “original package” and “first sale” doctrines, and limiting federal control over articles in interstate commerce by them; and *that it was not the purpose of the proponents of the act to go beyond the limits thus established or encroach upon the exclusive right of the state to control the article after the breaking or first sale of the original package within the state, nor could congress do so if it would.*

Having thus stated the gist of this debate so far as it discloses the general purpose of the act and the deficiencies it sought to reach and remedy, we support it by specific references. An adequate presentation of these debates would extend this brief beyond reasonable limits. Because we deem a detailed consideration of them extremely important in determining the construction of the Food and Drugs Act, we earnestly request that the Con-

gressional Record be consulted. A full citation of references appears in the Appendix.

(c) *Debate in the senate.*

The original Senate Bill (S. 88), having been introduced, referred to the Committee on Manufactures and reported back with certain amendments, came before the senate for debate. Senator Heyburn, the author of the bill, said in part (Vol. 40, pt. 1, Cong. Rec. 59th Cong. p. 895) :

“Nearly every State in the Union, Mr. President, has a pure food law. The States have undertaken to legislate upon this subject, with, I believe, but one or two exceptions. Some of the laws upon this subject are very meager; some of them are very local; some of them are adapted to the peculiar local interests of the people of the particular State, but, as a rule, the States have enacted intelligent and appropriate legislation upon this question. Their difficulty, which has been made plain to the committee, is that they can enforce the law only to the extent of the impure and adulterated products that are sent in unbroken packages within their borders from other States. There are a number of fraudulent articles that are under the ban of this legislation, not a pound or ounce of which is offered for sale in the State in which they are manufactured, because they are provided against by the legislation of that State; *but they are manufactured in one State and sent to another in unbroken packages under the rule of law that is now established, perhaps forever. So that the State into which they are sent is helpless against the flood of these impure articles sent in unbroken packages under the protection of that rule of law and then offered for sale upon the retail market.*

“*It is impossible for a State effectively to enforce a pure food law without the coöperation of the General Government. It is obvious that it is only the*

General Government that can protect us from the influx of deleterious and poisonous articles from foreign countries. That must be done at the port of entry. There we stop such importations. There has been a law for this purpose on the statute books since 1848. That law is enforced, I believe, fairly and, perhaps, as efficiently, as it can be under existing statutes and rules, but the proposed legislation fortifies the law of 1848 in providing a better method and more efficient coöperation between the branches of the Government in carrying out the spirit and intent of that law.

“Then, again, the distribution of ports of entry in the United States is now such that a port of entry may be far inland, and to these ports come goods from foreign ports manufactured in foreign countries that are in violation not only of every principle of common honesty and fairness and against the safety and protection of the people, but in violation of the law of our land. These importations go far inland to ports of entry in *unbroken packages*; there the lid is taken off and these deleterious articles are abroad in the land.

“To what extent does this affect the efficiency and the ability to execute the law of a State having good laws on this subject? There are ports of entry in the West in States that prohibit the manufacture or sale or distribution of these impure articles and do so efficiently, except as against outside interference. There is the point of necessity for the coöperation of the general government with the States in the enforcement of this class of legislation. *It is merely a question whether or not Congress will extend a helping hand for the enforcement of the laws of the States in the interest of the people so far as this class of imposition is concerned.*”

The text of the senate bill appears in connection with this debate. (Vol. 40, pt. 1, *supra*, pp. 897, 898.) It will be noted from an inspection of this bill that section 2 thereof corresponds closely to section 2 of the present

law; and that section 13 of the bill closely resembles section 10 of the law.

Senator Heyburn, speaking further on the same subject, said (Vol. 40, pt. 2, Cong. Rec. 59th Cong. p. 1417) :

“Congress alone can make effective the laws of the several States prohibiting the manufacture or sale of this class of articles. The States are helpless under the law. *Under the Constitution, as it has been construed by the Supreme Court of the United States, these goods may go from one State to another in unbroken packages, and it is not until the package is broken that the jurisdiction of the State attaches. The State laws are helpless. There is a cry from every State in the Union—I think I may say that I have within my possession a demand from nearly every State in the Union—that the Congress of the United States should supplement their legislation and afford relief against the impositions that come from one State to another.*

“Seldom are these forbidden articles sold in the State of their manufacture. Seldom do they bring themselves within the law of the State which would regulate them. What higher duty can Congress perform than that of assisting the State governments in their local selfgovernment in a matter which affects the people so closely?”

At another point, referring to a proposed substitute bill, the same senator said (Vol. 40, pt. 3, Cong. Rec. 59th Cong. p. 2656) :

“Most of the States would not permit the sale of articles containing the percentages mentioned in that fourth paragraph. It would result in the Government permitting a manufacturer to ship into the State goods that would be contraband under the State law. That is not fair to the State. It is the object of the pending bill *to aid the States in the enforcement of pure food laws. It should be elastic enough in its provisions to conform always to the limitations of the State law. If you were to under-*

take to ship into our State goods containing the percentages named in that fourth paragraph, *they would be contraband when they arrived in the State and the packages were broken.*"

Referring to and opposing a proposition to include specific standards in the bill, Senator Heyburn said (Vol. 40, pt. 3, *supra*, p. 2724) :

"I should like to make an inquiry of the Senator. Suppose Congress were to fix this standard, and it was not in conformity with the standard of the State in which these articles might be sold. Would it be within the power of Congress to enforce the law after the packages were broken? If not, would it not result in having within the State two standards for goods in common use and common trade? That is the reason why we have all the way through avoided the fixing of standards, because of the varying standards in different States. It is utterly impracticable to fix standards here. I have much sympathy with the Senator's amendment, that the highest standard that can be attained shall be maintained in legislation but it is impracticable to do it in national legislation, *because we cannot at all control the standards accepted by the States*, and if we should ever invade that field, we would have unending confusion in attempting to adjust the rights of the shipper with the dealer, with the factor. We would be unable to do it."

And again (Vol. 40, pt. 3, *supra*, p. 2758) the senator, answering a contention of Senator Bailey that the bill would prove an unconstitutional invasion of the police power of the states, under decisions such as that of *Plumley v. Massachusetts*, 155 U. S. 461, said :

"If the Senator will permit the interruption, in this bill we have *provided the line of contact at the unbroken package*, the jurisdiction of the government existing so long as the goods remain in the unbroken package, and the jurisdiction of the State

recognized over it *immediately when the package is broken*. The bill provides for that.

"This bill attempts neither to enlarge nor to diminish the rights of the State. We are not concerned in the rights of the State, except in considering that we do not trespass upon them. We have gone no further."

Again at page 2760:

"Now in regard to the State of Idaho, to which the Senator has referred, I would say that Idaho has a most excellent pure food law and that it is enforced by a very intelligent officer, and if the State of Idaho can be protected by the assistance of the General Government against the introduction of articles that are contraband in Idaho, the laws of Idaho will be much more effective in their results, and that is the object of this bill."

Another of the strong supporters of the senate bill was Senator McCumber of North Dakota.

Mr. McCumber, speaking on behalf of the bill and in answer to a query, said (Vol. 40, pt. 2, Cong. Rec. 59th Cong. p. 1217):

"Of course the Senator understands well that we cannot interfere with what the pure food commissioner in the State of Minnesota may do in the matters that purely affect the police power of that State, after the goods have been sold there."

The same senator, supporting the bill, said (Vol. 40, pt. 2, *supra*, pp. 1415-1416):

"Mr. President, has food adulteration and drug adulteration reached such proportions in the United States that it demands national consideration and a national attempt to eradicate it? The very fact that nearly every State in the Union has passed pure food laws, the very fact that their commissioners are working night and day to check the great

evil of misbranded and adulterated articles of food which are pouring over the border lines of the States, and the fact that organizations are formed everywhere in the United States to check this great evil, seems to be proof conclusive not only of its existence but also of its danger.

“• • •

“I have already explained that in the construction of the interstate commerce law it has been declared that the term ‘commerce’ not only covers an article in its transit from one State to another, *but it protects and shields that article until it is sold in original packages in the State of its consumption*; and then if you can find it you can punish the innocent retail dealer for selling it, even if he was innocent of knowledge of its impurity.

“It will be seen, therefore, Mr. President, that *the root of the evil is planted in that territory over which the State has no control and over which Congress has complete control—that is, the jurisdiction over interstate commerce.*”

Again referring to the bill generally, the senator said (Vol. 40, pt. 3, Cong. Rec. 59th Cong. p. 2665) :

“Now, Mr. President, I want only to say in closing that the bill which has been introduced by the Senator from Idaho (Mr. Heyburn) is practically the same one that we have introduced for the past three or four years. *It has for its object only supplementing the laws of the several States in their attempt to prevent the importation of misbranded and impure articles of food.* It makes no standard of foods by anyone. It simply declares what shall be deemed misbranded, what shall be regarded as adulterated, and no one can object to those definitions. Then it further declares that neither misbranded nor adulterated goods shall be transported from one State to another.”

Again at pages 2763–2765 of the same volume, the senator referred to the proposed scope and purpose of the bill as follows:

"I desire to say one other word in reference to the authorities that were sent to the desk to be read by the Senator from Texas (Mr. Bailey). The authorities he cites there do not in any way, as I understand, contravene in the slightest degree the statement I have made. There is no question but that Congress cannot reach over into the States and attempt to perform the police power of the States. The only proposition that I desire to stand upon is that Congress has the power to provide for conditions affecting interstate commerce, *so that it may assist the States in the police power of those States*. It does not exercise their powers in the slightest degree. *It simply exercises the power of Congress over interstate commerce*; and if that power is beneficial to the States or assists the States in any way in carrying out the provisions of their own police powers, it certainly cannot be objectionable for that reason.

* * *

"I can explain that in a moment. If the State were in the same position in which the United States is with reference to its ports of entry and could reach an article before it got scattered throughout the State, then I would say there would be no necessity whatever for a national law supplementing the State law. The National Government has officers at every port of entry and they examine every article that enters into a port, *but no State could possibly keep a corps of officers to examine every train that takes goods into that State to open every box of patent medicine or every box of canned goods that is supposed to contain salicylic acid or anything that is prohibited by that State*. Therefore we have to take cognizance of the condition, and the condition is that *so many of these impure, spurious articles are pouring like a mighty wave over the State boundary lines that there is no power within the State, without enormous expense, to check the dealings in adulterated articles*. But Congress, by its supplemental law, very easily will be enabled to get right back to the manufacturers in the several States and can cut off the sale of

these deleterious products probably within a year, because the moment a manufacturer finds that he must sell pure goods in a State he will cease to sell impure goods.

(Referring to the respective fields of control of the state and federal governments over interstate shipments.)

“Let me make it clear. While one cannot overlap the other in the slightest degree, nevertheless the one can be so exercised that it will supplement the other and be in exact harmony with it; and my claim is that that is as far as this bill possibly goes; that we do not go outside of the domain of interstate commerce. There we stop. But we can pass a law under our authority over interstate commerce, the result of which will be to assist the citizens of a State to enforce the police power of that State. Now, that is as far as this bill goes, and as far as I contend we can go.”

The foregoing statements (and many others of the same tenor) as to the necessity for and the purpose and scope of the bill were called for by criticisms from the opposition, of which the following are examples:

Senator Money of Mississippi, one of the chief opponents of the bill, referring to it and prior bills of the same character said (Vol. 40, pt. 3, Cong. Rec. 59th Cong. p. 2652):

“I assume that there is not a Senator here who does not sincerely desire that there should be a pure food bill of some sort. The trouble mainly has been, however, that pure food bills have been brought in to serve some special purpose rather than to effect any general reform and it is also true that some of the ablest Senators in the body have been unable to accept the pure food bills which have been offered because they authorized the general government in some measure to infringe upon the police powers of the several States.

“• • •

“The police power of the State or of any municipality, of any organized or unorganized society, is one of those inherent and inalienable powers that is necessary for the preservation of society itself. Therefore, it is very wise, indeed, that Senators should be careful in considering propositions that may tend in any manner to give a color to any pretension on the part of the Federal Government to encroach upon the powers of the States.”

Most of Senator Money's arguments were devoted to a substitute bill, which he offered, and not being therefore strictly germane to the senate bill, are not further referred to in detail.

One of the most eloquent opponents of the bill, Senator Bailey of Texas, said of its scope and purpose (Vol. 40, pt. 3, Cong. Rec. 59th Cong. pp. 2758, 2759, 2760):

“Mr. President, this bill is not an attempt to regulate commerce between the States or with Indian tribes or with foreign nations under any proper definition of that term. It is an attempt, so understood by the authors of it and so understood by the gentlemen who support it, to protect the people of the several States against deception in trade and against deleterious articles of food and drink. If it were an attempt in good faith to regulate commerce, there could be no doubt as to the power of the Federal Government over it; but as it is intended, understood, and supported for the purpose of protecting the people of the several States against injurious articles of food and drink, it is purely and only an exercise of the police power, and therefore, not within the power of the Federal Government.

(Referring to an argument by Senator Money.)

“The Supreme Court gives the Senator warrant for his statement. It says that this power of the State to protect the health of its people not only against injurious food articles, but to protect them against deception in trade, was one originally possessed by the States and was never surrendered to

the Federal Government by them, and is one which the Federal Government cannot exercise. * * *

"My own opinion is that the people of every State in this Union can best be left to take care of their own morals and their own health, because they are incomparably more interested in their morals and in their health than are their neighbors in distant States."

These general criticisms were supported in detail by Senator Bailey through many pages of the Congressional Record, but the foregoing is sufficient to show the general tenor of his criticism and the basis of the opposition to the bill.

(d) Debate in the house of representatives.

The senate bill, after being referred by the house to its committee on interstate and foreign commerce, was reported back by that committee with an amendment whereby the entire body of the senate bill was stricken out, and a bill framed by the aforesaid committee and hereinafter referred to as the house bill, was substituted. The full text of this bill appears in Vol. 40, pt. 9, Cong. Rec. 59th Cong. pp. 8994 and 8995.

It should be noted in regard to this bill that it contained the following specific provision, not appearing in the senate bill:

"Section 12. That this act shall not be construed to interfere with commerce wholly internal in any State, nor with the exercise of their police powers by the several States; but food and drugs fully complying with all of the provisions of this act shall not be interfered with by the authorities of the several States when transported from one State to another, so long as they remain in original, unbroken packages, except as may be otherwise defined by law or provided by the statutes of the United States."

Section 13 of the house bill, referring to seizure of articles not complying with the act, and corresponding in a general way to section 10 of the present law, contained nothing comparable to the provision of the present law limiting the right of seizure of goods arriving in a state to the period while they were in "unloaded, unsold, or in original, unbroken packages," except as such limitation was imported into section 13 of the house bill by the above provisions of section 12 thereof. And, as will be seen, one of the main criticisms of the house bill was founded on the claim that the latter half of section 12 completely nullified the first part thereof, destroyed entirely the operation of the "first sale" rule, and attempted to impair seriously the police power of the states over goods shipped into them and resold therein. This argument finally resulted in the elimination of this provision in conference. The following extracts from the addresses of supporters of the house bill indicate the purpose and scope of the bill and the evils sought to be remedied:

Representative Robinson of Arkansas, in the course of an elaborate argument said (Vol. 40, pt. 9, Cong. Rec. 59th Cong. pp. 8974, 8975, 8976):

"There is not now, nor has there ever been in my mind any question as to the power of the State to forbid the sale of adulterated or fraudulently branded articles for the protection of its citizens from danger of disease and from fraud. These subjects are peculiarly within the province of the States. The fact that the States have the power to enact such legislation in no sense detracts from the power of Congress to deny the instrumentalities and privileges of interstate commerce to articles which, if consumed, might injure the health of these citizens. The State cannot do this, for it has nothing to do with interstate commerce. The only in-

fluence it can exert upon interstate commerce is that incidental to its police regulations regarding inspection after an article has been imported, and forbidding its sales if deemed deleterious. Nowhere has it been held that Congress is without power to divest an article, adulterated or misbranded, designed for transportation and sale in another State than that in which it was manufactured, of its character as an article of commerce. I am not now discussing the policy of the exercise of this power, but the existence of it, and I say that if, according to the many authorities cited and others which I have not had an opportunity of presenting, Congress has plenary power over interstate commerce, over its instrumentalities, its subjects, and can determine what articles are proper articles of commerce, subject only to the limitations imposed by the Constitution itself, it can certainly deny to an article found to be adulterated or misbranded the right to be transported to another State.

* * *

“Clearly the line between state and federal authority in this matter is well drawn, although confusion may arise in attempting to trace it in some instances. The States have power to prescribe all needful rules for the protection of its citizens from frauds and misrepresentations and from injury therefrom by forbidding the manufacture within its own borders and the sale within its limits of any article deleterious to the health of the citizens, and in the matter of articles imported from other States, under its police power, a State may provide for the inspection of all articles imported, and if found unsound, may forbid their sale. *But no State can define what articles shall be imported or forbid the importation of any recognized article of commerce, and except for purposes of inspection, as a general rule, the State cannot interfere with any article of interstate commerce while it is in the hands of the importer in the original package unless the importer has mixed it with the general property of the State.* No State has any power to regulate interstate commerce. In the exercise of its police powers it

may affect the transportation of articles in interstate commerce, but such effect is merely incidental to the right of inspection.'

• • •

"The policy of this legislation is not vicious, but, on the contrary, it is wholesome. The first consideration that leads me to the conviction that Congress, having the power to do so, should enact this bill or some similar measure, is *the failure or inability of the States, in the main, to exercise their police powers to protect their citizens from frauds and injuries occasioned by impure and adulterated foods and drugs*, and this failure or their inability to do so, or both, accentuates the necessity for the exercise by Congress of its powers to deny the character of commerce to articles so misbranded or adulterated.

"As heretofore shown, the line between state and federal authority is reasonably distinct. *The State, for the protection of the lives and health of its citizens, can forbid the sale of deleterious articles; Congress can forbid their importation, and thus materially aid in protecting the public from the avarice of manufacturers who practice fraud in the introduction and sale of their products. The powers of the State and nation are distinct and independent, and the existence of the one does not question the existence of the other.* The legislation enacted by the various States does not indicate organized effort to prevent the imposition of fraud in the sale of food products and drugs. This fact urges upon my mind the consideration whether Congress can rightfully refuse also to act within the scope of its powers. The Government has a power which the States cannot exercise. That is the power to regulate commerce, to deny commercial character to fraudulent or misbranded, adulterated and unwholesome articles. *Why and how would the exercise of this power deprive any citizen of any right or any State of any power? The power of the State is separate from the power of the nation.* The State cannot exercise the national function, which is to regulate commerce between the States. *The na-*

tion cannot lessen the inherent power of every State to preserve peace and health among its citizens. How can it be wrong for Congress to say to manufacturers, 'You cannot use instrumentalities under our control to rob and oppress the public; you shall not claim protection under the Constitution from the enforcement of any state statute which seeks to prevent fraud and deception; neither will the strong arm of this government be extended to make heavier the burden of the States in the exercise of their rights and in the discharge of their duties'? The power to regulate commerce gives Congress the right to deny the instrumentalities and benefits of interstate commerce to persons and organizations who, for profit or other purpose, misrepresent their products and thus mislead and defraud the public."

Representative Richardson of Alabama, responding to a states' rights argument of Senator Henry of Texas, said (Vol. 50, pt. 9, *supra*, p. 8961) :

"Why, Mr. Chairman, it seems to me these gentlemen who are discussing the question of states' rights lose sight of the great aim and object that this bill has of inducing the States to coöperate with the Federal Government, or inducing the Federal Government to coöperate with the States, in order to destroy an evil that the States have been unable to conquer. That is the whole theory of the bill and the whole case. Does the decision which has been read by the gentleman from Texas (Mr. Henry) contain any prohibition of that doctrine? The Constitution cannot be construed by the strictest advocate of states' rights as not possessing the power to coöperate with the States in suppressing an evil that the State cannot control."

Representative Burgess of Texas, though in favor of the bill, generally opposed section 12 thereof. He said (Vol. 40, pt. 10, *supra*, p. 9068) :

"Now, gentlemen who have not read this—and doubtless there are many who have not—I invite

your attention to section 12, and I invite your attention to the word 'but' and the words following, and I invite your attention to the word 'except' and the words following as a limitation upon the character of the declaration in the words of the first three lines. After the first three lines declaring that 'This act shall not be construed to interfere with commerce wholly internal in any State, nor with the exercise of their police powers by the several States,' there is a limitation.

" 'But'—

" Says these other lines—

" 'But foods and drugs fully complying with all the provisions of this act shall not be interfered with by the authorities of the several States when transported from one State to another so long as they remain in original unbroken packages, except as may be otherwise defined by law or provided by statutes of the United States.'

" This asserts the direct proposition that if any article begins an interstate journey that such package transported and delivered and its carriage terminated as an interstate commerce transaction may, because of its form and size and its color or its weight, be still hedged about by the Federal power and the police power of the State absolutely suspended so long as the condition of the package is not changed. *I say that it is illogical, contrary to every theory of our Government, and ought not to get into this bill;* and I am not saying this now as a captious objector to pure food legislation, because I am in favor of the main provisions of this bill.

" More than that, the words beginning with the word 'except' assert the power of Congress to legislate in the future over such unbroken packages within a State and destroy and nullify the State's authority in such cases. *This is a monstrous doctrine, subversive of all the decisions of the Supreme Court of the United States and destructive of the police powers of the States. I cannot support the bill if this language remains in it.*"

The views of the opposition in the house, so far as they have not been already indicated, need not, for our present purposes, be considered in any further detail than as contained in the minority report on the house bill, which is published in full at pages 8910-8915, Vol. 40, pt. 9, *supra*. The following brief quotations from the very length minority report (p. 8910) indicate its general tenor:

"The power of government to regulate the sale of food products and drugs, prohibit adulteration of the same, prescribe the manner in which they shall be branded, and fix the size and weight of the packages in which such food products and drugs shall be contained is admittedly an exercise of police power. We do not understand or believe, from our conception of the powers of Congress, contained and specified in the Constitution of the United States, that Congress has the power or authority to enact police laws for the regulation of the manufacture, sale, or for the prevention of the adulteration of food, except so far as such laws may be made to apply to the District of Columbia, the Territories, and those localities over which Congress has, under the Constitution, exclusive jurisdiction.

"While we are in hearty accord with all efforts made for the purpose of having laws enacted to prevent the sale of impure or adulterated foods, or to prevent frauds and impositions upon the people by the sale of impure or adulterated food, we believe that the legislatures of the several states have full power and authority to enact such laws and to protect the people of the various States from fraud and imposition by the sale of impure or adulterated food and drugs. Nearly all of the States have enacted laws on the subject, and are enforcing them. The power to protect the people of the various States in health, in morals, in general welfare is inherent in the State—was reserved to the States by the Constitution, was not delegated to the Congress of the United States, and remains there to be

exercised by the States at the will and pleasure of the legislatures of such States.

... • • •

“It occurs to us to say that this is but another effort to minimize the powers of the State and to magnify the powers of the General Government, an effort to look to the general government for the correction of all the ills and evils with which the public may think itself afflicted. We believe that the State legislatures are competent to enact adequate laws on the subject, and that the State officials are both honest and efficient and will enforce the laws. We do not believe that this law will accomplish any more than State laws rigidly enforced would accomplish.

“Believing that this is an attempt on the part of the United States to exercise police power within the States, and that it is not a proper exercise of power by Congress under the commerce clause of the Constitution of the United States, we insist that neither the original bill which came from the Senate nor the substitute offered by the committee should pass.”

(e) Conference Report adopted.

The house bill having been passed by that body, the senate declined to agree to, and the house insisted upon the amendment to the original bill. A conference having been appointed, a first and a second conference report were submitted, the second conference report being adopted and constituting the present Food and Drugs Act.

As before stated, this conference report eliminated section 12 of the house amendment, so strenuously opposed; also section 13 of the house bill; substituting in place thereof what now appears as section 10 of the Food and Drugs Act, and which appeared in similar terms as section 13 of the senate bill.

Referring to this Conference Report, Senator McCumber, one of the senate managers, said (Vol. 40, pt. 10, Cong. Rec. 59th Cong. p. 9456) :

"We sought in the Senate bill to keep clearly within the provisions of interstate commerce and to avoid going into the State and interfering with the police power of the State. We have retained every provision practically the same as it was in the bill when it passed the Senate."

When the Conference Report came up for consideration in the house, the following colloquy occurred between Representative Mann (one of the house conferees) and Representative Williams. Just prior thereto Representative Mann, explaining the Conference Report to the house, said (Vol. 40, pt. 10, *supra*, p. 9738) :

"We struck out the provision which affected States' rights and the control of the Federal Government over original packages, leaving the law as it stands without regard to this bill."

The colloquy followed:

Mr. Williams: * * * "I am glad to hear that (the elimination of sec. 12), for I was very anxious to vote for the bill, and now I am able to do so.

Mr. Burleson: "Coupled with that statement, I desire to say that there are others who voted against the bill because of section 12.

Mr. Mann: "Mr. Speaker, it was because we desired the vote of the distinguished gentleman from Mississippi that we struck it out, so that it may be unanimous in the House."

(f) Conclusion drawn from the history of the adoption of the Food and Drugs Act.

From a study of the legislative history of the Food and Drugs Act but one conclusion as to the purpose of

the act, its scope and the situation it was designed to meet can be drawn. That conclusion is that it was not the aim of congress to impair in any degree whatsoever the authority of the several states to legislate for the protection of their citizens against impure foods and drugs. The aim and purpose of congress was to supplement those laws and render them effective through the aid of federal regulation, which alone could reach the foreign manufacturer and shipper, and thus protect the state from the impure article before it reached the field of state control. This fact is so significant and vital to this case, as well as so outstanding in the legislative history of the act, that it furnishes at once the excuse and justification for the rather lengthy incursion into such legislative history in which we have indulged.

It disposes once and for all of the argument that the purpose of the act, being to protect the ultimate consumer, required for its effective accomplishment that the act follow the imported article after it leaves the original package of shipment in the state, through all of the resales of it in such state, until it actually reaches the consumer. Confessedly, the act was designed to protect the consumer. But it sought to protect him, not by the exercise of control in a field which the state already occupied or had the exclusive right to occupy, but in a wider field where the state was powerless and the federal power supreme. It sought to protect him by erecting an impassable barrier between the manufacturer or shipper of the offending article in the one state and the consignee in another, and thus to prevent the entry of such article into the field of state control. It was a recognition by the federal power of an obligation to the several states and a performance of the corresponding duty. The obligation arose out of the delegation to congress by

the states of the exclusive power over interstate commerce and the consequent exclusion of themselves from any control thereof. Thereby the states had rendered themselves powerless effectively to interfere with articles of commerce shipped from other states, so long as the interstate shipment, as defined by this Court, continued. The duty incumbent upon congress was so to legislate under the exclusive power thus surrendered as to protect the states within this field where they were powerless adequately to protect themselves.

But it necessarily follows that the scope of the act is no broader than this purpose—no broader than the measure of this duty and obligation. The whole history of the act is eloquent of a studied effort to keep within those bounds; to refrain from anything which might be construed as an attempt to invade or impair the right of the state absolutely to control an article received from without, after it has been taken from the package of shipment within the state, or after such package has been resold therein.

As was said in the case of *McDermott v. Wisconsin*, 228 U. S. 115, 128:

“The Food and Drugs Act was passed by Congress under its authority to *exclude from interstate commerce* impure and adulterated food and drugs and to *prevent the facilities of such commerce being* used to enable such articles to be transported throughout the country from their place of manufacture to the people who consume and use them, and it is in the light of the purpose and of the power exerted in its passage by Congress that this Act must be considered and construed.”

And even more strikingly in the case of *Hipolite Egg Co. v. United States*, 220 U. S. 45, 54:

"The object of the law is to keep adulterated articles out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being transported or when they have reached their destination, provided they remain unloaded, unsold, or in the original, unbroken packages."

See also *Weeks v. United States*, 38 Sup. Ct. R. 219, 220 (decided Feb. 4, 1918).

We submit, therefore, that congress passed the act of June 30, 1906, with this evident purpose, which measures and limits its scope, not to set aside, supplant or circumscribe state legislation, not to attempt to control the internal commerce of the state in commodities reaching its borders through the channels of interstate shipments, but solely to supplement the efforts of the individual states by regulating the field of interstate commerce which they could not control, and thereby to round out the state codes by the federal code into a vast system which should furnish complete protection to every citizen. Thus construed and limited, there cannot be (as there should not be) any question of conflict between the two systems; the state law does not become operative upon the article of interstate commerce until the federal control has ended; and thus each is supreme in its own peculiar field.

3. The terms "unbroken package" and "original unbroken package," properly defined, limit the field of operation of the Food and Drugs Act to interstate transactions, and the courts have construed the act accordingly.

We have already (pp. 39-40, *supra*) considered to a certain extent the meaning of these terms, so far as it was revealed by inspection of the text of the act, without

extraneous aids, and have determined such meaning in accordance with the foregoing statement. We now proceed to define and apply these terms in the light of the authorities.

(1) *The phrases "unbroken package" and "original unbroken package," when used in relation to interstate shipment of commodities, had acquired a clearly defined meaning at the time of the enactment of the Food and Drugs Act.*

It must be conceded that the term "original package," when used with reference to interstate shipments of goods, had a perfectly well settled meaning at the time of the passage of the Food and Drugs Act.

Brown v. Maryland, 12 Wheat. 419, 441;

Leisy v. Hardin, 135 U. S. 100, 110;

Rhodes v. Iowa, 170 U. S. 412, 424;

Schollenberger v. Pennsylvania, 171 U. S. 1, 19;

May v. New Orleans, 178 U. S. 196;

Austin v. Tennessee, 179 U. S. 343;

American Steel & Wire Co. v. Speed, 192 U. S. 500, 519;

Cook v. Marshall County, 196 U. S. 261;

Heyman v. Southern Ry. Co., 203 U. S. 270, 276;

Savage v. Jones, 225 U. S. 501, 520;

Purity Extract Co. v. Lynch, 226 U. S. 192, 200;

McDermott v. Wisconsin, 228 U. S. 115, 134;

Thornton, Pure Foods & Drugs, p. 143, 150-177.

And the terms "original unbroken packages" (secs. 2 and 10 of the act) and "unbroken packages" (sec. 3 of the act) had, prior to the adoption of the act, been considered synonymous.

Low et al. v. Austin, 80 U. S. 29;

U. S. v. Fox, Fed. Cas. No. 15155.

Thornton, at page 158, sums up the definitions of the authorities as follows:

“From a consideration of all the decisions and upon the basis of common understanding of the words, it seems that an original package within the meaning of the Food and Drugs Act is the unit, complete in itself, delivered by the shipper to the carrier, addressed to the consignee, and received by him in the identical condition in which it was sent, without separation of the contents in any manner.”

It may be well to add to this definition the requirement that the shipment be made in good faith, and in the usual course of trade, and not for the purpose of evasion of statutory requirements.

Austin v. Tennessee, supra.

(2) In adopting a definition of these terms, there was also defined by the courts a limitation upon federal control over an interstate shipment; federal control ended and state control began when the importer broke or sold the original package.

Not only had these terms acquired this definite, fixed meaning prior to the adoption of the Food and Drugs Act, but it had become definitely settled by a long series of decisions of this and other courts that the authority and control of congress over articles shipped in interstate commerce was measured and limited by this very definition. When the article left the original package or such package was sold within the state, federal control over the article ceased and state control attached. This principle is announced or applied in practically every one of the cases cited at page 57, *supra*, defining the term “original package.” As determined in the case of *Low v. Austin*, 80 U. S. 29:

“Goods imported do not lose their character as imports, and become incorporated into the mass of property of the State *until they have passed from the control of the importer or have been broken up by him from their original cases.*” (Head note.)

An excellent statement of these established principles, together with a compilation of cases illustrating their application is found in Vol. 12 C. J. (tit. “Commerce”) pp. 31–32.

(3) This Court, in construing the meaning of the phrases “unbroken package” and “original unbroken packages” in the Food and Drugs Act, will adopt the established meaning of those phrases and the limitation of federal control therein embodied, unless the act in express terms or by unmistakable implication requires the adoption of a different meaning.

The fact that the federal control over articles shipped in interstate commerce had thus been definitely limited, at the time of the framing and adoption of the Food and Drugs Act, to the point of the breaking or resale, within the receiving state, of the original package, and the fact that this term “original package” had then been clearly defined as the package or case of shipment, would ordinarily, under settled rules of construction, be most persuasive, if not conclusive, as to the meaning of the references in the Food and Drugs Act to “original unbroken packages.”

United States v. Trans-Missouri Freight Assn.,
58 Fed. 58;

Jorgenson v. Chicago & Northwestern Ry. Co., 153
Wis. 108, 116;

36 Cyc. (Statutes) 1145.

The supreme court of Wisconsin in the above case said:

“Gross negligence has received a very certain and definite meaning in the jurisprudence of this state, somewhat different from the meaning given to it in other states * * * . That meaning has been so thoroughly intrenched and established here *that it must be conclusively presumed that the legislature knew of such meaning, and used the words (in the statute under consideration) intending to give them their established legal significance.*”

Surely the same principle ought to be applied with undiminished force to the term “original packages” or “original, unbroken packages” used in the Food and Drugs Act, in view of the established meaning of those terms at the time of the passage of that act, unless the act in and by its terms expressly provides a different interpretation.

To use the words of a well known text on statutory construction, it is presumed

“that the legislature does not intend to make any alteration in the law, beyond what it explicitly declares, either in express terms or by unmistakable implication; or, in other words, beyond the immediate scope and object of the statute. In all general matters beyond, the law remains undisturbed.”

Endlich, Interpretation of Statutes, sec. 113, p. 152.

On this very point, with respect to the meaning of these terms in the Food and Drugs Act, the words of Representative Mann, one of the house conferees, regarding the Conference Report (the present law), in laying it before the house, will be recalled:

“We struck out the provision which affected the question of States’ rights and the control of the Federal Government over original packages, *leaving the law as it stands without regard to this bill.*”

This same principle was applied in an interpretation of these phrases of the act by Solicitor McCabe, shortly after the act went into effect. There had been an attempt on the part of the federal departments to define these terms in what is known as Regulation No. 2, of certain rules and regulations adopted by them. This regulation provided among other things:

“The original package contemplated includes both the wholesale and the retail package.”

Referring to this definition of the term “original unbroken packages,” Solicitor McCabe said in the course of a careful and exhaustive opinion known as Food Inspection Decision 86, approved by the secretary of agriculture:

“For the purpose of such determination (of the meaning of this term in the act) it is not permissible to resort to the common and popular understanding of these words, for the reason that they have received a special meaning and import when applied to the law of interstate and foreign commerce, through numerous judicial decisions upon the commerce clause of the Constitution, and were employed in the food and drugs act in that sense.”

In the same Decision it is pointed out that this prior definition of this term “original, unbroken packages,” embodied in Regulation 2 of the Rules and Regulations, which so defined them as to make them inclusive of “both the wholesale and the retail package” had resulted in endless confusion.

“Upon the basis of this regulation the inspectors have collected a large number of samples, but when an examination of some of the cases had been made, with prosecutions in view, it has been found that no action could be taken because the package bought was not an original package, though apparently

so upon a reasonable interpretation of the regulation. Furthermore, the department is advised that the food commissioners of some of the States, guided by a literal interpretation of the regulation, have refrained from the enforcement of their laws upon all packages apparently embraced within its terms."

This Food Inspection Decision then modifies the early definition of these terms and defines them as follows:

"Construed in the light of judicial determinations of the question, the terms 'original, unbroken packages' (as set out in the regulation and as used in sections 2 and 10 of the act) and 'unbroken packages' (as used in section 3 of the act) will be restricted to such a package containing the food and drug product as has been prepared for shipment or transportation and shipped or transported, as an entirety or unit, from a State * * * into another State * * * and delivered to the consignee, remaining his property in the identical form and condition in which it was shipped or transported. After arrival in a State and delivery to the consignee, if any part of the contents of the package be removed, or if the package be opened and commingled with other property, or if the package be *transferred* by the consignee, it is no longer an original package. The retail package is not an original package unless it bears the characteristics set forth above."

Can this be accepted as a substantially accurate statement of the field of operation of the Food and Drugs Act? Or must it be modified in view of the decisions of this and other courts interpreting and applying the act? And if it must be modified, in what manner and to what extent must it be changed? The determination of these questions will manifestly go far toward solving the vital points involved in the present case.

(4) The Food and Drugs Act contains no language which requires or authorizes the Court to give to the phrases "unbroken packages" and "original unbroken packages" a different meaning than the established one; the whole text of the act justifies and requires the adoption of the settled meaning of these phrases and the limitation of federal control therein implied.

It must be conceded that the foregoing rules of construction, as applied to the Food and Drugs Act, demand the interpretation of the phrase "original, unbroken packages" in accord with its meaning as established in the original package decisions, unless there is some provision of the act which "in express terms or by unmistakable implication," requires that such phrase be given a different construction.

The phrase "original, unbroken packages" appears in sections 2 and 10 of the act. Section 2, so far as it relates to interstate shipments, imposes penalties on two classes of individuals:

(a) Upon the person "who shall ship or deliver for shipment" any adulterated or misbranded article. The package limitation does not apply here, for the reference is limited to the person responsible for shipping the article.

(b) Upon the person who shall receive such shipment "and having so received, shall deliver, in original unbroken packages * * * or offer to deliver to any other person any such article."

Manifestly the act referred to in the last paragraph is an act operative upon the shipment *as received*. As has been stated, it was already the settled law, under the original package decisions, that the breaking of the

package of shipment marked the termination of federal control and subjected the product to state regulation. *Hence there was neither justification nor necessity for that act to be referred to in this section dealing with personal penalties.* But the law was also settled by the original package cases that the sale of the imported article in the package of shipment—the original unbroken package—was not subject to state regulation, but was within the exclusive field of federal supervision. Therefore, in order to make this section coextensive in its prohibitions with the entire field of federal control, it was necessary to describe and forbid this act. In what language could the subject matter of such resale be more aptly and exactly described than by the words which had been judicially used for years in describing the bounds of federal control—“original, unbroken packages”? And where, in this paragraph, can be found any justification for the claim that these words were here used in any different and especially in any more inclusive sense?

Turning now to section 10 of the Food and Drugs Act, we find an analogous situation. This section is designed to deal, not with the shipper or importer, but with the article shipped, and provides for its confiscation, if it be adulterated or misbranded under the terms of the act. This section, so far as it relates to interstate shipments, provides for confiscation during two distinct periods:

(a) While the article “*is being transported from one State . . . to another for sale.*”

(b) While the article, “*having been transported, remains unloaded, unsold, or in original unbroken packages.*”

Paragraph (a) covers the period of actual transporta-

tion. Paragraph (b) covers the period of possession of the article by the importer at the conclusion of the actual transportation thereof. Hence the latter paragraph uses language aptly describing the possible status or condition of such article while in the possession of the importer. The word "unloaded" needs no comment, covering as it does the primary status of the article upon the conclusion of actual transportation. "Unsold" is clearly used to negative any idea that the act is attempting to continue federal control over the article after the first sale of it has commingled it with property in the state. This, of course, is in absolute conformity to the prior decisions of this Court. "Or in original unbroken packages." Can it be doubted that this again is a direct reference to the thoroughly established rule, with which congress was thoroughly familiar when it passed the act, namely: that the breaking of the package of shipment by the importer terminated federal control over it? And can it be denied that the use of these words "in original unbroken packages" was pursuant to a plain purpose to limit federal control under the act accordingly?

We recognize that the three terms "unloaded," "unsold" and "in original unbroken packages" are used disjunctively, not conjunctively. But all of them (as the first two clearly indicated) are used with reference to the period of possession of the goods by the importer or consignee. The only extent to which this disjunctive form of statement, viewing it in the light most favorable to appellee, can be said to broaden to any extent the "original package" and "first sale" doctrine is this: it may be said to justify a seizure of the contents of the package of shipment, after the importer has broken it and removed its contents, and while they are still in his

possession unsold. For it may be claimed that the articles seized are "unsold" within the act, even though they are no longer in the "original, unbroken packages."

While we are convinced from our study of the history of the act that it was not the intent of congress to enact even this limited extension of the recognized field of federal control over interstate shipments, and while we believe that the word "unsold" was used to signify "unsold original packages," nevertheless we recognize the basis afforded for the broader construction by this disjunctive use of terms.

This view was apparently adopted by this Court in the case of *McDermott v. Wisconsin*, 228 U. S. 115, referred to at pages 83, 117 of this brief. We urge that the Court in considering and deciding this case, reconsider this portion of the decision in the *McDermott* case. Both the text of the act (outside of the disjunctive form of this single phrase) and its legislative history evidence a clear intent to limit strictly the federal control assumed by it within the well-known bounds established by the "original package" and "first sale" decisions. An examination of hundreds of cases brought in the various district courts for seizure and condemnation of food or drugs under section 10 (the so-called Notices of Judgment), shows that the seizure is always (quoting the language uniformly used in the decisions) of goods "remaining unsold in the original unbroken packages." This clearly shows a practical construction (see page 86, *infra*) in accordance with the construction contended for in this brief. While the extension of the period of federal control recognized in the *McDermott* case is not great—covering only the period after the breaking of the original package by the importer and until the sale of its contents by him—the principle involved is im-

portant, for it results in an extension of the field of federal control beyond the limits theretofore recognized. Furthermore, it will doubtless be claimed to include a right to introduce the imported article into the channels of local trade, not only by a first sale of the original package but also by a sale by the importer of the individual containers which he has removed from such package.

Therefore while we assert in this brief the limitation of federal control under section 10 of the act defined in the *McDermott* case, we desire to have such references understood as being made subject to the contentions here advanced, and the request here made for a reëxamination by the Court of that portion of the decision.

But no possible justification can be found in the language of this section for departing further than the extent indicated from the settled rules as to federal control over interstate shipments. And assuredly none can be found there for adopting the construction appellee urges, which would justify an assertion of federal control over each individual container in the shipment through any number of intrastate sales and until the contents of such container was actually being consumed.

Any such construction cannot find justification in the words "unloaded" or "unsold," for reasons instantly apparent. It must be based upon a construction of the phrase "original unbroken packages," which would make such phrase include the immediate container. And this construction of that phrase, as we have already shown from a number of viewpoints, is thoroughly untenable.

While sections 2 and 10 of the Food and Drugs Act are the only sections in which the phrase "original unbroken packages" occurs, the phrase "unbroken pack-

ages" is found in section 3 of the act. This section provides for "the collection and examination of specimens of foods or drugs * * * which shall be offered for sale in unbroken packages in any state" other than that of their manufacture or production. Manifestly the words "unbroken packages" were used to correlate this section properly with sections 2 and 10.

Turning now from the sections of the Food and Drugs Act relating to the interstate transportation of or commerce in the article, let us examine those sections of the act which define adulteration or misbranding and therefore *are concerned with the essential character of the article itself as manufactured or prepared for consumption.*

The importance of this transition should not be overlooked. When we leave those portions of the act which concern themselves directly with the interstate shipment of, and interstate commerce in, the article we would naturally expect to leave at the same time the peculiar phraseology developed especially to describe the interstate shipment and the limits of control under the commerce power; and we should naturally expect to find in place of those terms new phrases, adapted to describe the character of the article of food or drugs and the manner of its preparation for the market or for sale to or use by the ultimate consumer. For, as has already been stated, the purpose of the act is to protect the consumer by exercising a strict control over the channels of interstate commerce. And logically such an act must provide, not only what acts of the shipper or importer are prohibited, but what deficiencies in the foods or drugs themselves, or in the manner of their preparation for market, shall operate to bar them from the channels of interstate commerce. And it is those sections of the act

which perform this latter function which are now to be considered.

Section 7 of the Food and Drugs Act defines adulteration, and section 8 defines misbranding of foods and drugs. In those two sections are found numerous phrases which obviously refer to the immediate container, and not to the "original unbroken package" of the interstate shipment. For instance, section 7 provides:

(a) That no one of certain drugs "shall be deemed to be adulterated * * * if the standard of strength, quality or purity be plainly stated *upon the bottle, box, or other container thereof.*"

(b) That where certain preservatives are used by external application only, the article shall not be deemed adulterated if such preservative is necessarily removed in preparing the article for consumption, "and directions for the removal of said preservative *shall be printed on the covering or the package.*"

And section 8 provides:

(a) The term "misbranded" shall apply to specified articles of food or drugs, "*the package or label of which shall bear any statement, design, or device regarding such articles,*" which is false or misleading.

(b) In case of a drug, where the *contents of the package as originally put up* shall have been removed, in whole or in part, and other contents shall have been placed *in such package*, or *if the package fail to bear a statement on the label of the quantity*" of certain specified substances which it contains.

(c) In case of a food "*if it be labeled or branded so as to deceive or mislead the purchaser,*" etc.

(d) In case of a food, "*if in package form and the contents are stated in terms of weight or measure, and*

they are not plainly and correctly stated *on the outside of the package*.

(e) In case of a food, "*if the package * * * or its label shall bear any statement, design or device regarding the ingredients*" which is false or misleading.

(f) Articles of a certain class "labeled, tagged, or branded so as to plainly indicate that they are compounds, imitations or blends and (having) the word 'compound,' 'imitation,' or 'blend,' as the case may be, * * * *plainly stated on the package in which it is offered for sale*" are not to be deemed adulterated or misbranded.

The foregoing is believed to be a fair resumé of the significant portions of sections 7 and 8 of the Food and Drugs Act referring to the container. As already indicated, and as appears from the italicized words, these references relate to the immediate container. Manifestly this must be true, for the sections relate to adulteration and misbranding—the preparation of the article for market.

But this concession does not weaken or affect in any way the contentions already advanced as to the meaning of the phrases used in the other sections of the act and the limitations upon the field of federal control which they fix. Rather, it strengthens those contentions. No offense under the federal act is committed by the *production* of an adulterated or misbranded article in any state of the Union. The offense occurs when the article so adulterated or misbranded is put into the channels of interstate commerce. Hence the language used in the act in describing the methods of production merely describes the qualifications of the article for interstate shipment. But it is the language of the act relating to

the interstate transportation itself which measures and determines the period of federal control.

From this examination of the text of the act it is clear that it furnishes no justification for discarding or modifying the meaning of the phrases "unbroken packages" and "original unbroken packages," or the limitation of federal control therein implied (except possibly the slight modification of such control implied in the phrase "unloaded, unsold or in original unbroken packages"—pages 75-76, *supra*). On the contrary, the text of the act confirms the settled meaning of those phrases and confirms their limitation of federal control over interstate shipments to the period of transportation and the period of retention of the article by the importer "unsold or in original unbroken packages."

(5) The authorities interpreting the Food and Drugs Act apply the foregoing meaning of the phrases "unbroken packages" and "original unbroken packages" and limit the field of federal control under the act accordingly.

It is not desired at this point to consider the authorities interpreting the Food and Drugs Act so far as they relate to the police power of the several states. That phase will be covered in a later portion of the brief. We consider them at this time only so far as they define the phrases "unbroken packages" and "original unbroken packages," used in the act.

The meaning of these terms has been considered in a number of cases:

Rast v. Van Deman & Lewis, 240 U. S. 342, 362;

Seven Cases v. United States, 239 U. S. 510, 515-516;

Price v. Illinois, 238 U. S. 446, 453-455;

McDermott v. Wisconsin, 228 U. S. 115, 136;
Savage v. Jones, 225 U. S. 501;
Hipolite Egg Co. v. United States, 220 U. S. 45,
57;
United States v. 65 Casks, 170 Fed. 449, 452;
Ex parte Agnew, 131 N. W. (Neb.) 817, 819.

In these cases this court has considered the meaning of these terms either directly or incidentally. Special reference to two of them, on which the decisions of the others largely rest, will be sufficient for the purpose of the proposition here under consideration.

In case of *Hipolite Egg Co. v. United States*, *supra*, p. 51, it was said with reference to the extent of the federal supervision over adulterated or misbranded products contemplated by sections 2 and 10 of the Food and Drugs Act:

“Section 2 makes the shipper of them criminal and section 10 subjects them to confiscation, and, in some cases, to destruction, so careful is the statute to prevent a defeat of its purpose. In other words, *transportation in interstate commerce is forbidden to them*, and, in a sense, they are made culpable as well as their shipper. It is clearly the purpose of the statute that they shall not be stealthily put into interstate commerce and be stealthily taken out again upon arriving at their destination and be given asylum in the mass of property of the State. Certainly not, *when they are yet in the condition in which they were transported to the State, or, to use the words of the statute, while they remain ‘in the original, unbroken packages.’* In that condition they carry their own identification as contraband of law. Whether they might be pursued *beyond the original package* we are not called upon to say. That far the statute pursues them, and, we think, legally pursues them, and to demonstrate this but little discussion is necessary.”

It will be noted that this case defines the phrase "in the original, unbroken packages" as descriptive of "the condition in which they were transported to the State." In other words, that is a clear definition of that phrase as synonymous with the package of interstate shipment, or the "original package," as known and defined in interstate commerce.

The matter was again considered in the case of *McDermott v. Wisconsin*, 228 U. S. 115, 135, 136.

This case, of course, involved primarily the misbranding provision of the Food and Drugs Act. However, it was contended in defense of the Wisconsin statute attacked, that the cans of goods in that case had been removed from the "original package" or case of shipment, and, *although still in the hands of the importer*, were no longer subject to federal control. Answering this contention, this Court said:

"In the view, however, which we take of this case it is unnecessary to enter upon any extended consideration of the nature and scope of the principles involved in determining what is an original package. For, as we have said, keeping within its Constitutional limitations of authority, Congress may determine for itself the character of the means necessary to make its purpose effectual in preventing the shipment in interstate commerce of articles of a harmful character, and to this end may provide the means of inspection, examination and seizure necessary to enforce the prohibitions of the act, and when paragraph 2 has been violated the Federal authority, in enforcing either paragraph 2 or paragraph 10, may follow the adulterated or misbranded article *at least to the shelf of the importer*. • • •

"To make the provisions of the act effectual, Congress has provided not only for the seizure of the goods while being actually transported in interstate commerce, but has also provided for such seizure after such transportation and while the

goods remain 'unloaded, unsold, or in original unbroken packages.' The opportunity for inspection en route may be very inadequate. The real opportunity of government inspection may only arise when, as in the present case, the goods as packed have been removed from the outside box in which they were shipped and remain, as the act provides, 'unsold.' It is enough, by the terms of the act, if the articles are *unsold*,* whether in original packages or not. Bearing in mind the authority of Congress to make effectual regulations to keep *impure or misbranded articles out of the channels of interstate commerce*, we think the provisions of paragraph 10 are clearly within its power. Indeed it seems evident that they are measures essential to the accomplishment of the purpose of the act."

No decision of this court has extended the provisions of the Food and Drugs Act further than the limits established by this interpretation of the language of the act. And this decision gives no warrant for the assertion of any measure of federal control *beyond the custody of the imported goods by the importer, whether within the package of shipment or removed by him therefrom.*

A construction limiting the meaning of these words to the package of shipment has been applied by the federal courts generally in enforcing the act.

United States v. Two Barrels of Desiccated Eggs,
185 Fed. 302;

United States v. 300 Cases of Mapleine, (Dist.
Court, No. Dist. Ill., Sanborn, Dist. Judge)
N. J. No. 163.

See also

Ex parte Agnew, 131 N. W. (Neb.) 817, 819.

And a clear distinction has been consistently maintained between the word "package," as used in the sev-

* Italics appear in original text.

enth and eighth sections of the Food and Drugs Act, and "original unbroken package" or "unbroken package," as used in the second, third and tenth sections thereof.

Seven Cases v. United States, 239 U. S. 510, 515-516;

McDermott v. Wisconsin, 228 U. S. 115, 130;

Dr. L. J. Stephens Co. v. U. S., 203 Fed. 817, 818, 820.

In the last case, the circuit court of appeals approved *in toto* of the following language of the district judge (see p. 820) :

"It will furthermore be noted that the statute declares that it is one 'for preventing * * * the transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein.' The words, 'package' and 'original unbroken package,' are both used in the act. The word 'package' is not used in the same sense as 'original unbroken package.' *The framers of the act manifestly had in mind the definition heretofore given by the courts to the term 'original package,' and in the second, third, and tenth sections have used that expression, or its equivalent.* It is used in those sections with reference to the situations which arise where the article transmitted has reached the vendee or consignee, but has not yet become a part of the general property of the State in which the vendee or consignee lives. The package, still being unbroken, and not having become a part of the property of the State, remains subject to federal control. *The article, if thus found, is subject to seizure, and may thereby be prevented from reaching the ultimate consumer.* The word 'package' is repeatedly used in this act without any modifying adjective or other qualifying term. It is in such instances to be taken in its broad sense. The word

‘package,’ as thus used, means the package made up by the manufacturer for sale to the ultimate consumer, which goes into the possession of the person who will use the article of food or drugs.”

It clearly appears from an examination of the foregoing cases interpretating the Food and Drugs Act, that the words “original unbroken package” and “unbroken package” have been given uniformly the meaning they possessed at the time of the passage of the act; and that the phrase “unloaded, unsold or in original unbroken package,” as defined by this Court, offers no justification for federal regulation of imports after they have been sold by the importer.

4. The practical construction and application of the Food and Drugs Act has been such as to limit its operation to the interstate shipment.

(1) Long established usage and practice under a statute indicating a generally accepted interpretation of it, is given great weight by the courts in construing the statute.

“On the principle of contemporaneous exposition, common usage and practice under the statute, or a course of conduct indicating a particular understanding of it, will frequently be of great value in determining its real meaning, especially where such usage has been acquiesced in by all parties concerned, and has extended over a long period of time.”

36 Cyc. “Statutes,” pp. 1139, 1140.

And see

Sutherland Statutory Construction, secs. 309-312;
First National Bank v. United States, 206 Fed.
374, 379;

Wells Fargo & Co. v. Mayor, 207 Fed. 871, 880;
Minnesota Rate Cases, 230 U. S. 352, 353-354.

In case of *First National Bank v. United States*, *supra*, p. 379, the rule is stated and the authorities in its support cited:

"This is the interpretation of this act of Congress which was given to it by the Secretary of the Treasury and by the Attorney General, who were charged with the duty of executing it, and it is an established rule of the national courts that the contemporaneous construction given to an act of Congress by those charged with its execution, though not controlling, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, nor unless it is clear that their construction was wrong. *Edward's Lessee v. Darby*, 12 Wheat. 206, 210, 6 L. Ed. 603; *United States v. Moore*, 95 U. S. 760, 763, 24 L. Ed. 588; *United States v. Johnson*, 124 U. S. 236, 253, 8 Sup. Ct. 446, 31 L. Ed. 389; *United States v. Philbrick*, 120 U. S. 52, 59, 7 Sup. Ct. 413, 30 L. Ed. 559; *United States v. Hill*, 120 U. S. 169, 182, 7 Sup. Ct. 510, 30 L. Ed. 627; *Baker v. Swigart*, 199 Fed. 865, 873, 118 C. C. A. 33; *United States v. Miller* (C. C.) 187 Fed. 369, 370; *United States v. Newport News Shipbuilding & D. D. Co.*, 178 Fed. 194, 204, 101 C. C. A. 514, 524."

(2) *The entire course of administration of the Food and Drugs Act supports the construction of such act which limits the period of federal regulation to the period of the interstate shipment.*

We have made a somewhat detailed study of the course of administrative procedure under the Food and Drugs Act since its passage. It seemed reasonable to assume that if there was any disposition to enforce the regula-

tory provisions of the act beyond the point where the imported article was sold by the importer, evidences of it would have been found in such a study. Outside of the decision in the case of *Corn Products Refining Co. v. Weigle*, 221 Fed. 988, a decision by Judge Sanborn, who adopted there a construction of the act similar to the one he has adopted in this case, we find no unreversed decision giving a broader interpretation to the act. If the difference in the two interpretations contended for were slight, this might not be very significant. But it is not slight. The interpretation contended for by the bill of complaint includes or may include within federal control the entire field of intrastate sales of pure foods or drugs.

The prosecutions under the act are reported in what is known as Notices of Judgment, and now number more than five thousand. A large proportion of them are proceedings *in rem* in the various district courts of the United States. An examination of a very large number of these cases, as reported by the bureau of chemistry of the department of agriculture, shows absolute uniformity in the practical construction given section 10 of the act. In every one of the cases examined it is expressly stated that jurisdiction was acquired by the seizure of the product while "remaining unsold in the original unbroken packages."

It is surely self-evident that if appellee's interpretation had been in the minds of the officers charged with the enforcement of this act, we would have no difficulty in finding many applications of it. None such appear. On the contrary, the act, as administered, has been applied within the recognized field of federal regulation over interstate commerce, limited, *so far as the state is concerned*, by the point where the imported goods were

taken from the package of shipment or were sold in such packages by the importer. This uniform and long continued interpretation of the act should be given great, and in view of other considerations presented, decisive weight in interpreting it.

The Food and Drugs Act has thus been examined from four viewpoints:

- (1) The text of the act considered alone.
- (2) The essential or dominant purpose of the act, considered especially in the light of its legislative history.
- (3) The limitation imposed by the phrases "unbroken packages" and "original unbroken packages," especially as those phrases have been judicially interpreted.
- (4) The practical construction of the act by the officers charged with its enforcement.

Examining the act from each of these viewpoints, identical conclusions are reached as to the field of regulation it purports to cover in respect to interstate commerce. That field extends from the point of initiation of the shipment in the one state to its conclusion in the other, and controls the goods at the latter point so long as they remain in the possession of the importer, unsold in the packages of importation, but does not undertake to follow them further.

IV

The several state statutes challenged by the appellee constitute a legitimate exercise of the police power of the state to protect its people against impure or harmful food and drugs, or against fraud or imposition in respect to the sale of such articles.

It is proposed at this point to consider the power of the state of Wisconsin to pass the statutes in question, assuming for the present that there is no inhibition in the Food and Drugs Act.

1. The effect of benzoate of soda upon health being in serious dispute, the legislature of the state of Wisconsin had the right to make a conclusive determination on the subject, finding such chemical to be harmful.

It cannot be denied that the question of whether benzoate of soda, when used as an ingredient in foods, is harmful is in most serious dispute in the scientific world.

The conflict of opinions on the subject was hot at the time of the passage of the Federal Food and Drugs Act, and has continued ever since. The department of agriculture and the three secretaries were at first emphatically opposed to the use of chemical preservatives generally and benzoate of soda in particular. (See Food Inspection Decision 76, where the entire matter is exhaustively considered.) In the course of this Decision, it is said:

“There is a difference of opinion among experts as to the harmfulness of sodium benzoate or benzoic acid. * * * In the opinion of the Board it is harmful, and its use should be prohibited.”

This ruling was modified by Food Inspection Decisions 89 and 101, to the extent of permitting the use of benzoate of soda pending further investigation, in quantities not exceeding one-tenth of one per cent in those foods in which it had been generally theretofore used, provided the label plainly stated its presence.

Then the Remsen board reported, finding the use of benzoate of soda in limited quantities harmless, and the three secretaries adopted this report in, and made it the basis of, Food Inspection Decision 104 and of Regulation 15.

The determination of this board by no means settled the dispute which has continued since with unabated vigor. The following articles in the Journal of the American Medical Association have criticized the conclusions of the Remsen board and condemned the use of this preservative:

Journal Am. Med. Assn., Vol. 53, p. 755; Vol. 53, p. 304; Vol. 52, p. 562; Vol. 52, p. 978; Vol. 52, p. 1534; Vol. 55, p. 139; Vol. 55, p. 153; Vol. 55, p. 1651; Vol. 56, p. 1493.

See also

Address by Dr. Chas. A. L. Reed of Cincinnati at Denver, 1909, Pure Food Convention, published in The American Pure Food and Drug Journal Vol. 1, No. X, Oct. 1909; Special Bulletin, Food Dept. Agricultural Exp. Station, N. D. E. F. Ladd, Commissioner, Vol. 1, No. 12, June, 1909, pp. 5-6; Bulletin No. 167, Michigan, Dairy & Food Department, July, 1909.

After an exhaustive examination into this entire matter, in an action in the federal courts of Indiana, instituted by this appellee, the court determined the existence of this controversy as a matter of fact, and said:

“From the evidence and the master’s report thereon, it is evident that the question of the harmfulness and harmlessness of benzoate of soda is, as yet, an open one in the scientific world.”

Curtice Brothers Co. v. Barnard, 209 Fed. 589, 592.

The question of the healthfulness of benzoate of soda being thus debatable, the state has the right, acting under its police power for the protection of the health of its citizens, to determine the question conclusively.

Hutchinson Ice Cream Co. v. Iowa, 242 U. S. 153, 159;

Armour & Co. v. North Dakota, 240 U. S. 510, 513;

Rast v. Van Deman & Lewis, 240 U. S. 342, 365–368;

Tanner v. Little, 240 U. S. 369, 385–386;

Price v. Illinois, 238 U. S. 446, 451, 452;

Adams v. Milwaukee, 228 U. S. 572, 582–583;

Red “C” Oil Co. v. No. Carolina, 222 U. S. 380, 392–393;

Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 364–366;

Curtice Bros. Co. v. Barnard, 209 Fed. 589, 592–594.

Thus, in the case of *Price v. Illinois*, *supra*, pp. 451, 452, this principle was applied to an Illinois statute condemning boric acid as a preservative which the state determined to be unwholesome and injurious.

“The state has undoubted power to protect the health of its people and to impose restrictions having reasonable relation to that end. The nature and extent of restrictions of this character are matters for the legislative judgment in defining the policy of the State and the safeguards required. In the

avowed exercise of this power, the legislature of Illinois has enacted a prohibition—as the statute is construed—against the sale of food preservatives containing boric acid. And unless this prohibition is palpably unreasonable and arbitrary we are not at liberty to say that it passes beyond the limits of the State's protective authority. *Powell v. Pennsylvania*, 127 U. S. 678, 686; *Crowley v. Christensen*, 137 U. S. 86, 91; *Holden v. Hardy*, 169 U. S. 366, 395; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 246; *Jacobson v. Massachusetts*, 197 U. S. 11, 25; *Silz v. Hesterberg*, 211 U. S. 31, 39; *McLean v. Arkansas*, 211 U. S. 539, 547; *Chicago, Burlington & Quincy R. R. v. McGuire*, 219 U. S. 549, 569; *Purity Extract Co. v. Lynch*, *supra*; *Hammond Packing Co. v. Montana*, 233 U. S. 331, 333. The contention of the plaintiff in error could be granted only if it appeared that by a consensus of opinion the preservative was unquestionably harmless with respect to its contemplated uses, that is, that it indubitably must be classed as a wholesome article of commerce so innocuous in its designed use and so unrelated in any way to any possible danger to the public health that the enactment must be considered as a merely arbitrary interference with the property and liberty of the citizen. It is plainly not enough that the subject should be regarded as debatable. If it be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury upon the issue which the legislature has decided."

And the same conclusion was reached as to a statute of the state of Indiana condemning benzoate of soda, and applied as against the product of this appellee.

Curtice Bros. Co. v. Barnard, *supra*, pp. 593-594.

The condemnation of the article by the state statute may be by name, instead of in general terms.

Atlantic Coast Line v. Georgia, 234 U. S. 280, 288;

Price v. Illinois, 238 U. S. 446, 452-453.

2. Benzoate of soda is often employed to conceal the use of inferior and unwholesome components and insanitary processes in the manufacture of food products, whereby (in addition to the effect on health) the public is deceived as to the character or quality of such product.

Dr. Wiley, in Department of Agriculture Bulletin No. 84, part IV, p. 1044, (1908) referring to investigations of the bureau, said:

"Results of these investigations have shown that there is not a single article of food which has been commonly preserved by means of benzoic acid or benzoate of soda which cannot be preserved and offered to the consumer in perfect condition without the aid of any chemical preservative. This fact has been completely demonstrated in the case of cider and grape juice, mincemeat, jelly, jams, catsups, preserves, and other articles of the same character."

This is manifestly the theory upon which state statutes forbidding any preservative except certain natural agents, are based.

Price v. Illinois, 238 U. S. 446, 448;

Curtice Bros. Co. v. Barnard, 209 Fed. 589, 594.

A cause for the use of benzoate of soda, instead of natural preservatives, we need not go far to seek. In the case of

United States v. 275 Cases of Tomato Catsup
(Dist. Court, S. D. Ohio, July 12, 1910)
N. J. No. 1044,

the unrefuted testimony showed that all of the good tomatoes delivered at the factory were first removed and canned. Then

"the cores, the skins, the worm-eaten and insect-bitten tomatoes, the partly green, and some decayed tomatoes, were thrown into a trough which from time to time was scraped out by boys. This refuse was put into the pulping machine and subjected to heat.

* * * From the pulping machine the pulp was put into old whiskey barrels of some 200 gallons capacity and were stored in the cellar and most of the catsup made in the fall and winter following. Some of the barrels exploded because, as is said, they were not air tight, but it was the contents of only those that exploded that were rejected in making the catsup. Apparently the spices and benzoate of soda were added when the time came to actually take the pulp from the barrels to make the catsup, although the maker said he put up some 20 casks as an experiment and did not use benzoate of soda. This experiment failed, for the catsup spoiled."

The unrefuted testimony of the government chemists, who examined this delightful food product, showed

"that this catsup contained eighty to one hundred millions of bacteria to the teaspoonful, and yeast germs and mould spores in proportion. Home made catsup and catsup made at factories with similar care and choice of material, contain very few."

Numerous additional cases of the same character are cited in the footnote.*

* Since 1913, the following prosecutions (so-called Notices of Judgment) under the act, similar to the above case, have been conducted and decisions in favor of the United States rendered in the several district courts indicated:

United States v. H. N. Weller, et al., N. J. No. 2386 (No. Dist. of Ohio); *United States v. New Wooster Pres. Co.*, N. J. No. 2783 (No. Dist. of Ohio); *United States v. 16 Barrels*, N. J. No. 3362 (Dist. of Ore.); *United States v. 25 Cases*, N. J. No. 3367 (Dist. of Ore.); *United States v. Pioneer Pres. Co.*, N. J. No. 3438 (West. Dist. of Mo.); *United States v. 3 Barrels*, N. J. No. 3450 (West. Dist. of Wash.); *United States v. 50 Barrels*, N. J. No. 3535 (East. Dist. of La.); *United States v. 10 Cases*, N. J. No. 3542 (Dist. of Colo.); *United States v. 80 Cases*, N. J. No. 3567 (East. Dist. of Ill.); *United States v. 15 Cases*, N. J. No. 3581 (No. Dist. of N. Y.); *United States*

This same practice is found to exist and is described at length in the elaborate findings of the master in the case of *Curtice Bros. Co. v. Barnard, supra*, which are too lengthy to quote in full. He found that

“Where factory waste, refuse, cores, skins and peelings of rotten and decomposed tomatoes are used in the preparation of tomato catsup, not being run through a sieve, they produce a thin, watery catsup, and such catsup cannot be prepared so that it will keep after opening without the use of benzoate of soda, benzoic acid or similar preservative. The use of benzoate of soda in such catsup delays and retards fermentation, and such nonfermenting products are calculated to deceive the public as to the actual ingredients of which the product is made, and to cause the public to believe that the product is made of pulp of fruit, instead of cores, skins and peelings.” (Note: The findings of the master do not charge that the product of Curtice Bros. Co. is made of these inferior components.)

v. Knadler & Lucas, N. J. No. 3588 (West. Dist. of Ky.); *United States v. Otto Kuehne Pres. Co.*, N. J. No. 3612 (Dist. of Kansas); *United States v. 11 Barrels*, N. J. No. 3619 (West. Dist. of Wash.); *United States v. 3 Barrels*, N. J. No. 3628 (West. Dist. of Wash.); *United States v. 48 Cases*, N. J. No. 3675 (Dist. of New Mexico); *United States v. 6 Barrels*, N. J. No. 3682 (West. Dist. of Wash.); *United States v. 2 Barrels and 31 Cases*, N. J. No. 3678 (Dist. of Ore.); *United States v. 70 Cases*, N. J. No. 3708 (East. Dist. of Pa.); *United States v. 4 Barrels*, N. J. No. 3803 (West. Dist. of Pa.); *United States v. 10 Crates*, N. J. No. 3824 (West. Dist. of Pa.); *United States v. 34 Cases*, N. J. No. 3948 (West. Dist. of Texas); *United States v. 100 Cases*, N. J. No. 3954 (Dist. of Md.); *United States v. F. W. Stute, et al.*, N. J. No. 3983 (East. Dist. of Mo.); *United States v. 8 Cases*, N. J. No. 4066 (Dist. of Conn.); *United States v. Cruikshank Bros. Co.*, N. J. No. 4175 (West. Dist. of Pa.); *United States v. 10 Kegs*, N. J. No. 4265 (Dist. of Ore.); *United States v. 250 Cases*, N. J. No. 4556 (No. Dist. of Texas); *United States v. 15 Barrels*, N. J. No. 4628 (So. Dist. of N. Y.); *United States v. M. C. Flaccus*, N. J. No. 4694 (No. Dist. of W. Va.); *United States v. 100 Barrels*, N. J. No. 4716 (So. Dist. of N. Y.); *United States v. Lewis Packing Co.*, N. J. No. 5071 (No. Dist. of Cal.)

3. Either the protection of the public health or the prevention of fraud and imposition furnishes ample basis for the prohibition of the sale in the internal commerce of the state of food products containing benzoate of soda.

The authorities cited at page 92, *supra*, upholding the power of the state to decide conclusively all questions of the harmful character of any food product, where the character of such product is debatable, also affirm the power of the state to exclude products which it has thus determined to be deleterious.

The power of the state to protect its citizens by preventing fraud and deception in respect to food products sold in the state is equally well established.

Savage v. Jones, 225 U. S. 501, 524;

Crossman v. Lurman, 192 U. S. 189, 197;

Capital City Dairy Co. v. Ohio, 183 U. S. 238, 246;

Plumley v. Massachusetts, 155 U. S. 461, 472.

And, as supporting the same principle, see

Heath & Milligan Co. v. Worst, 207 U. S. 338, 357;

Palapasco Guano Co. v. North Carolina, 171 U. S. 345, 358.

As was said in the oft-quoted case of *Plumley v. Massachusetts*, *supra*, p. 472,

"If there be any subject over which it would seem the states ought to have plenary control, and the power to legislate in respect to which ought not to be supposed was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly

or incidentally affect trade in such products transported from one state to another state. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of congress to regulate commerce among the states."

The foregoing authorities, applied to the facts in this case, amply support the power of the state of Wisconsin to enact the challenged statutes, either—

- (a) As a protection to the health of its citizens; or
- (b) As a means of preventing fraud and imposition in respect to food products.

V

The state statutes challenged by appellee deal solely with the internal commerce of the state; they do not invade the field of federal regulation over interstate commerce exercised by the Food and Drugs Act, or conflict with the provisions of that act; hence they are legitimate regulations under the police power of the state and are not open to successful attack.

There have thus far been considered:

- (a) The power of congress under the commerce clause to regulate the transportation and sale of foods and drugs.
- (b) The specific assertion of that power in the Food and Drugs Act of June 30, 1906, with special reference to the field of control thereby assumed over interstate transactions.
- (c) The inherent police power of the state to protect its citizens against impure foods or drugs and against fraud and imposition in their preparation and sale, with specific reference to the challenged statutes.

The first two subjects refer to a field where federal control is supreme, and to an exercise of power by way of legislation therein; the last refers to a field in which the power of the state is inherent and exclusive, and to an assertion by it of its sovereignty therein.

Conceding, as of course we do, that the inherent police power of the state cannot be so exercised as to encroach (to the extent of imposing direct burdens) upon the field of federal control over interstate commerce, it logically remains for us to consider whether the state statutes challenged, if correctly construed, conflict with the Food and Drugs Act, as already interpreted.

1. The state statutes challenged, although containing no express exception excluding from the field of their operation transactions constituting interstate commerce, must be construed as if such an exception were embodied in them.

The state statutes challenged by the appellee are set forth at page 5, *et seq.*, of this brief. Section 4600 embodies an inclusive definition of "food," and provides a penalty to be imposed on any person who, by himself or through another, or as agent of another shall "sell, exchange, offer for sale or exchange" any article of food which is adulterated.

The portion of section 4601 referred to in the bill provides that an article of food shall be deemed adulterated "if it contains any added substance or ingredient which is poisonous, injurious or deleterious to health, or any deleterious substance not a necessary ingredient in its manufacture."

The bill also refers to parts of sections 4601g, e and f. The first section forbids under a penalty selling, offer-

ing or exposing for sale or having in possession with intent to sell for use or consumption in Wisconsin any article of food containing "added benzoic acid or benzoates," except where such preservative can be eliminated before consumption of the food. Section 4601c forbids in similar terms the sale of articles of food for use or consumption in the state which contain certain specified chemical preservatives, "or any other preservative injurious to health." And section 4601f provides a penalty for the violation of section 4601e.

It is unnecessary to discuss these statutes in detail. It will doubtless be admitted that all of the objections to any of the statutes may be sufficiently presented by a consideration of section 4601g.

(1) Under the settled rule of the supreme court of Wisconsin in construing the inclusive language of state statutes similar to the statutes challenged in this action, such statutes will be so construed as not to apply to interstate commerce.

The language of the state statutes challenged is general, and contains no specific exception of transactions constituting interstate commerce. Section 4601g, of which particular complaint is made, provides in part as follows:

"It shall be unlawful to sell, offer or expose for sale or have in possession with intent to sell for use or consumption in this state, any article of food as defined in section 4600 of the statutes, which contains added benzoic acid or benzoates," etc.

The supreme court of Wisconsin has consistently held, as regards such statutes, that they are to be given a construction which will render them valid. And where a

literal construction of the language of the statute would bring it into fatal conflict with some federal power or inhibition, a narrower construction, confining it to the legitimate field of state legislation, will be adopted.

Parker-Harris Co. v. Kissel Motor Car Co., 165

Wis. 518, 519;

Stickney Co. v. Lynch, 163 Wis. 353, 356-357;

State v. Leuch, 156 Wis. 121, 129-130;

State v. Ry. Co., 152 Wis. 341, 350;

Milwaukee County v. Halsey, 149 Wis. 82, 84;

Water Power Cases, 148 Wis. 124, 138;

Patrick & Co. v. Deschamp, 145 Wis. 224, 227;

State v. Railway Co., 136 Wis. 407, 417;

Elwell v. Adder Machine Co., 136 Wis. 82, 88;

Loverin etc. Co. v. Travis, 135 Wis. 322;

State v. Anson, 132 Wis. 461, 473;

Chicago etc. Ry. Co. v. State, 128 Wis. 553, 561;

Greek-American Sponge Co. v. Richardson Drug

Co., 124 Wis. 469, 475-476.

As was said in the case of *State v. Anson*, *supra*, p. 473,

“Before we exert that highest of judicial prerogatives to declare that the concurrent legislative branch of the government has attempted to act beyond its competency, we must be convinced thereof beyond reasonable doubt, and, if there might within reason be any theory or purpose which would bring the questioned legislation within its purpose, it is our duty to assume such basis for it.”

Applying this principle, the supreme court of Wisconsin has held that the inclusive words “its property,” referring to corporations, domestic and foreign, doing business in Wisconsin, would be construed to refer to

such of the corporate property of a foreign corporation as was located within the state.

State v. Leuch, supra.

And it has repeatedly construed the broadly inclusive language of section 1770b, Wisconsin statutes, which prescribes the conditions which must be complied with by foreign corporations to entitle them to do business in the state, so as to exclude interstate commerce.

Greek-American Sponge Co. v. Richardson Drug Company, supra;

Patrick & Co. v. Deschamp, supra;

Loverin etc. Co. v. Travis, supra;

Elwell v. Adder Machine Co., supra;

Stickney Co. v. Lynch, supra;

Parker-Harris Co. v. Kissell Motor Car Co., supra.

As was said in the case of *Elwell v. Adder Machine Co., supra*,

“There must be read into the foregoing statutes, where they forbid the transaction of business in this state and the acquisition, holding and disposal of property in this state, an exception of such business as constitutes interstate commerce, and an exception of such property as is acquired, held or disposed of in this state in carrying on interstate commerce.”

(2) This court will assume that this policy of construction will be applied by the state supreme court to the statutes challenged, and will treat them as if thus restrictively construed. And it is the settled policy of this Court to accept the construction of a state statute approved by the supreme court of the state.

It is the settled policy of the federal courts, when considering a claim that a state statute violates rights

secured by the federal constitution, to accept the construction accorded to it by the highest court of the state.

Chaloner v. Sherman, 242 U. S. 455, 460;

Price v. Illinois, 238 U. S. 446, 451;

Purity Extract Co. v. Lynch, 226 U. S. 192, 198;

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 73;

Olson v. Smith, 195 U. S. 333, 342;

Cargill Co. v. Minnesota, 180 U. S. 452, 466;

Missouri Pacific Ry. Co. v. Nebraska, 164 U. S. 403, 414;

Morley v. Lake Shore Ry. Co., 146 U. S. 162, 166;

Weightman v. Clark, 103 U. S. 256, 260.

And where the supreme court of the state has consistently construed general language in statutes relative to the transaction of business in the state in such a way as to read into them an exception as to business constituting interstate commerce (*Elwell v. Adder Machine Co.*, *supra*), this court will assume that a similar construction will be given the inclusive language of section 4601g, and the other challenged state statutes, and will consider them limited accordingly.

An excellent example of the application of this principle is found in the case of *St. Louis Southwestern Ry. v. Arkansas*, 235 U. S. 350, 368, *et seq.*

The state statute challenged in this case provided that if "any corporation" failed to pay certain prescribed taxes, the state tax commission must cancel its certificate "and said corporation shall forfeit its right to do business in this state." Considering the claim that the inclusive language of this section necessarily applied to corporations engaged in interstate commerce and prescribed a forfeiture of their right to transact interstate

business and was therefore void, this Court said (pp. 368, *et seq.*) :

“But the state court has not as yet construed the section as calling for the forfeiture of the privilege of doing interstate business in the event of nonpayment of the franchise tax; nor is the state here insisting upon such a construction. The present is an ordinary action to collect the tax as a debt, and not to forfeit the franchise for its nonpayment. *Non constat* but that the state court will hold, when confronted with the question, that the franchise to be forfeited pursuant to paragraph 20 is confined to intrastate commerce. Such a construction is clearly foreshadowed by what the court has in this case held with respect to the general purpose of the act. And in exercising the jurisdiction conferred by paragraph No. 237, Jud. Code, it is proper for this court to wait until the state court has adopted a construction of the statute under attack, rather than to assume in advance that such a construction will be adopted as to render the law repugnant to the Federal Constitution. *Bachtel v. Wilson*, 204 U. S. 36, 40; *Adams v. Russell*, 229 U. S. 353, 360; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 546. And see *Ohio Tax Cases*, 232 U. S. 576, 591. At present, therefore, we have merely to consider whether paragraph 20 so clearly requires a forfeiture of the interstate franchise for nonpayment of the tax in question that it is not reasonable to anticipate that the state court will put another construction upon it. And in doing this we ought not to indulge the presumption either that the legislature intended to exceed the limits imposed upon state action by the Federal Constitution, or that the courts of the state will so interpret the legislation as to lead to that result. No canon of construction is better established or more universally observed than this, that if a statute will bear two constructions, one within and the other beyond the constitutional power of the law-making body, the courts should adopt that which is consistent with the Constitution, because it is to be presumed that the legislature in-

tended to act within the scope of its authority. *United States v. Coombs*, 12 Pet. 72, 76; *Grenada County Supervisors v. Brogden*, 112 U. S. 261, 269; *The Japanese Immigrant Case*, 189 U. S. 86, 101."

And see also:

Chicago etc. Ry. Co. v. Anderson, 242 U. S. 283,
287-288.

The same principle was applied to other sections of the Wisconsin food and drug act in the case of *Corn Products Co. v. Weigle*, 221 Fed. 988, 996.

Hence, for purposes of this case, a construction of the Wisconsin statutes challenged must be assumed which will limit their general language to the appropriate field of state regulation, as heretofore defined. It was, of course, this same result which the state sought by the disclaimer made by the attorney general in open court, which is embodied in the decree. (Trans. p. 18.)

2. The state statutes challenged do not conflict with the provisions of the Food and Drugs Act, nor do they attempt to occupy any portion of the field occupied by such act; hence, they are not invalidated thereby.

(1) An intent to supersede by federal legislation the exercise by the state of its police power as to matters not specifically covered by such federal legislation is not to be implied, unless the federal act, fairly interpreted, is in direct conflict with the law of the state.

This principle is well established and salutary. It is vital in this case.

Missouri etc. Ry. Co. v. Harris, 234 U. S. 412,
419, *et seq.*

Savage v. Jones, 225 U. S. 501, 533-534;
Southern Ry. Co. v. Reid, 222 U. S. 424, 442;
Northern Pacific Ry. Co. v. Washington, 222 U. S.
370, 379;
Asbell v. Kansas, 209 U. S. 251;
Crossman v. Lurman, 192 U. S. 189, 199-200;
Reid v. Colorado, 187 U. S. 137, 148;
Missouri etc. Ry. Co. v. Haber, 169 U. S. 613,
627, 635.

And see:

Minnesota Rate Cases, 230 U. S. 352, 397, *et seq.*

Some of these were cases where fatal conflict was alleged to exist between a state statute and the Federal Animal Industry Act. They afford excellent illustrations of the application of the principle under discussion.

The case of *Missouri, Kansas and Texas Ry. Co. v. Haber*, *supra*, involved such a situation. The Kansas statute under consideration imposed a civil liability for damages upon any carrier who brought into the state diseased cattle. It was held that the imposition of civil liability was not covered by the federal act; hence the state statute was valid. This Court, after express recognition of the principle that "a state statute, although enacted in pursuance of a power not surrendered to the general government, must in the execution of its provisions, yield, in case of conflict, to a statute constitutionally enacted under authority conferred upon Congress" (p. 626), said (p. 627):

"Although the power of Congress to regulate commerce among the states, and the power of the states to regulate their purely domestic affairs, are distinct powers, which, in their application, may at

times bear upon the same subject, no collision that would disturb the harmony of the national and state governments or produce any conflict between the two governments in the exercise of their respective powers need occur, unless the national government, acting within the limits of its constitutional authority, takes *under its immediate control and exclusive supervision the entire subject* to which the state legislation may refer."

The Court then considers in detail a number of cases dealing with analogous situations, and concludes (p. 635):

"These cases all proceed upon the ground that the regulation of the enjoyment of the relative rights, and the performance of the duties, of all persons within the jurisdiction of a state belong primarily to such state under its reserved power to provide for the safety of all persons and property within its limits; and that even if the subject of such regulations be one that may be taken under the exclusive control of Congress, and be reached by national legislation, any action taken by the state upon that subject *that does not directly interfere* with rights secured by the Constitution of the United States or by some valid act of Congress, must be respected until Congress intervenes."

In the case of *Reid v. Colorado*, *supra*, which involved a similar situation, this Court sustained the Colorado statute on the ground that the federal act, being limited to transportation of cattle *known* to be diseased, did not cover the entire field, but left the states free to legislate on the subject of prohibiting the transportation into the state of cattle *actually* diseased. The Court at page 148, said:

"It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the states, even when it

may do so, *unless its purpose to effect that result is clearly manifested*. This court has said—and the principle has been often reaffirmed—that ‘in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, *the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.*’ *Sinnot v. Davenport*, 22 How. 227, 243. The certificate given to the defendant by Assistant Inspector Hart of the Bureau of Animal Industry was in itself without legal weight in Colorado.”

The same principle is applied under the Animal Industry Act as amended, in *Asbell v. Kansas*, *supra*.

The case of *Crossman v. Lurman*, *supra*, involved an alleged conflict between a pure food statute of the state of New York and an act of congress prohibiting the importation into the United States of adulterated foods. The state court held that certain coffee was adulterated within the meaning of the state statute, and sustained the purchaser in his rejection at New York of part of the shipment, the balance being accepted. The seller claimed that, inasmuch as the coffee had been imported from Brazil, the whole matter was within the field regulated by the federal act, and that such act did not exclude this coffee, for particular reasons specified. This Court met this contention as follows (pp. 199–200):

“We think it unnecessary to determine whether the statute lends even color to the proposition, since we think it is clear that its effect, whatever be its import, *was not to deprive the state of its police power to legislate for the benefit of its people in the prevention of deception and fraud, and thus to control sales made within the state of articles so adulterated as to come within the valid prohibition of the state statute.*”

The case of *Savage v. Jones, supra*, involved an alleged conflict between a statute of the state of Indiana which regulated the sale and required a statement of the formula of ingredients of concentrated stock foods, and the Federal Food and Drugs Act. The principle under discussion was applied, and the validity of the state statute upheld, because its regulations were not within the scope of the federal act. This Court said (p. 533) :

“But the intent to supersede the exercise by the state of its police power as to matters not covered by the federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in *actual conflict with the law of the state*. This principle has had abundant illustration.”

And the Court then applied the rule (p. 539) :

“Applying these established principles to the present case, no ground appears for denying validity to the statute of Indiana. That state has determined that it is necessary in order to secure proper protection from deception that purchasers of the described feeding stuffs should be suitably informed of what they are buying and has made reasonable provision for disclosure of ingredients by certificate and label, and for inspection and analysis. The requirements, the enforcement of which the bill seeks to enjoin, are not in any way in conflict with the provisions of the federal act. *They may be sustained without impairing in the slightest degree its operation and effect. There is no question here of conflicting standards, or of opposition of state to federal authority.* It follows that the complainant's bill in this aspect of the case was without equity.”

To the same effect, see:

Standard Stock Food Co. v. Wright, 225 U. S. 540.

The force of the principle under discussion, applied to this case, is clear. The Food and Drugs Act does purport to regulate imported articles beyond the period of their custody by the importer. The most inclusive language in the act, the phrase "unloaded, unsold or in original unbroken packages," relates, as has been shown, wholly to such custody. Conceding, for argument's sake only, that congress might have gone further and regulated intrastate transactions, thus following the imported articles to the point where they came into the possession of the consumer, *it has not done so*. The federal act, fairly interpreted, does not extend its regulation beyond the point indicated. Therefore, no intent to supersede the power of the state of Wisconsin to exercise its unquestioned police power through the challenged statutes can be read out of the mere fact that congress has legislated upon the general subject of pure foods and drugs, in terms sufficiently broad *to include within the class of subjects regulated* appellee's products.

(2) *A federal statute, which, by permissive language or by absence of any inclusive prohibition, recognizes an article as a legitimate subject of interstate commerce, does not thereby compel its recognition by the state as a proper subject of its internal commerce, or prohibit the state from excluding it from the channels of purely local trade.*

This is really an application of the principle just discussed. For if a prohibition of state legislation as to lo-

cal affairs is not to be read into federal legislation, when not within the scope of such legislation fairly construed, it must necessarily follow that the express or implied declaration of the legitimacy of a certain article of trade, resting either on specific approval or absence of prohibition in the federal act, must be limited by the same general restrictions which control the act as a whole. And where, as in the case of the Foods and Drugs Act, the field of control assumed by congress is so limited as not to extend beyond the period of possession of the imported article by the importer, all features of the act must be similarly limited. The recognition by the act of the legitimacy of any product as an article of commerce must be construed as bounded by the limitation which controls the act as a whole, and, thus construed, it cannot be said to provide for such product a passport giving it the freedom of the channels of intra-state trade, in the face of state legislation barring it therefrom.

Much emphasis is placed by the bill of complaint upon the action of the secretary of agriculture in determining that benzoate of soda is harmless; and on the consequent declaration by the secretaries of agriculture, of the treasury, and of commerce and labor of Food Inspection Decision 104 and of Regulation 15(c), based thereon. We do not deem it at all necessary to discuss the exact nature of the powers conferred upon these officers by congress, or to consider whether or not they transcended such powers in making the determinations in question. Nor do we deem it essential to decide whether the determination of fact so reached (that benzoate of soda is harmless) is or is not conclusive upon the federal courts in cases arising under the act.

It will readily be conceded that these officers were

vested with merely administrative functions under the act and hence could not by their determinations modify or enlarge the field of control occupied by congress in the act. If this field of federal control is so limited as not to include the internal commerce of the state, no action of administrative officers under it can have vitality outside of such limits. These considerations are elementary and self-evident. (*United States v. Antikamnia Chemical Co.*, 231 U. S. 654, 666, *et seq.*; Opinion of Attorney General Wickersham, 29 Op. Atty. Gen. 494.)

Reading Food Inspection Decision 104 and Regulation 15(c) in the light of these essential limitations, they amount simply to an official declaration that "*no objection will be raised*" to the interstate shipment of foods containing benzoate of soda, provided the labels indicate its presence. This amounts to nothing more than a mere official promulgation of a policy of noninterference with such goods when so shipped. Assuredly it can have no greater force, when thus promulgated, than it would have if congress had seen fit to include it in the text of the act; and, if thus included, it would simply have been an assurance to the manufacturer, shipper or consignee that the product containing benzoate of soda would not be interfered with under the act while in the channels of interstate commerce. There is no basis for the claim that the product would thereby also be assured freedom from interference while the subject of intrastate purchases and sales.

In the case of *Rast v. Van Deman & Lewis*, 240 U. S. 342, 361-362, this Court had occasion to consider a contention that certain acts of congress there referred to, permitting the enclosure in packages of tobacco of certain tokens, operated to invalidate the so-called "trading stamp law" of the state of Florida. The argu-

ment was advanced that, because the federal acts and the state law both purported to operate on the same product, to wit, tobacco, and the former permitted the practice of insertion of coupons which the latter forbade, therefore the former must be held to override the latter and to guarantee to such products immunity from interference in the internal commerce of the state. This Court declined to adopt this line of reasoning (p. 362):

"Let it be granted," the Court said, "that this provision *permitted* the enclosure in the *package* of tobacco of tokens of the character with which this case is concerned. It goes no farther, nor does it purport to go farther. *It does not attempt to protect and enforce the permission to the retail sales of packages in the State. It might not legally have such effect, if attempted*; and such attempt will not lightly be inferred. *Savage v. Jones*, 225 U. S. 501; *Standard Food Co. v. Wright*, 225 U. S. 540."

Another analogous situation is presented by the familiar case of the imposition of federal taxes on liquors, thereby recognizing the same as a legitimate object of interstate commerce. While this Court has repeatedly asserted the right of intoxicating liquors to travel all the paths of interstate commerce without local restraint, it has as insistently refused to extend such protection beyond such limits, or to afford such product protection in intrastate transactions from the most drastic prohibitory legislation of the states. (*Leisy v. Hardin*, 135 U. S. 100, 122, and many similar cases.)

And the case of *Austin v. Tennessee*, 179 U. S. 343, 362-363, is most significant. One of the arguments there used to induce this Court to hold that small single packages of cigarettes shipped into Tennessee were "original packages" and as such free from state prohibitory laws, was that these single packages were rec-

ognized as legitimate articles of commerce by the federal statutes, which expressly require this size of package for purposes of taxation. This Court declined to adopt this reasoning.

As was said (p. 362) :

“It is one thing to force *into a State*, against its will, articles or commodities that can have no possible connection with or relation to the health of the people. It is quite a different thing to force *into the markets of the State*, against its will, articles or commodities which, like cigarettes, may not unreasonably be held to be injurious to health.”

See also :

Leisy v. Hardin, *supra*, p. 116, 117 ;

Plumley v. Massachusetts, 155 U. S. 461, 466 ;

Hebe Co. v. Calvert, 246 Fed. 711, 720 ;

McGregor v. Cone, 104 Ia. 465, 73 N. W. 1041,
1044, 39 L. R. A. 484 ;

Ex parte Agnew, 131 N. W. (Neb.) 817, 819.

It cannot therefore be successfully contended that the federal recognition under the Food and Drugs Act of products containing benzoate of soda as legitimate articles of interstate commerce gives them an open sesame to the channels of intrastate trade, or prohibits the state from regulating or prohibiting their purchase or sale therein.

(3) Since the state statutes challenged do not interfere in any respect with the right of the appellee to ship its product into the state in interstate commerce, but they simply deny to such product the facilities of the purely internal commerce of the state, they do not conflict with the federal act or interfere with its operation, but are valid police regulations.

This court has decided several cases under the Food and Drugs Act which throw much light upon this, the ultimate proposition in this case.

Rast v. Van Deman & Lewis, 240 U. S. 342, 361-362;

Armour & Co. v. North Dakota, 240 U. S. 510;

Price v. Illinois, 238 U. S. 446, 454, 455;

McDermott v. Wisconsin, 228 U. S. 115;

Hipolite Egg Co. v. United States, 220 U. S. 45.

And see also:

Curtice Bros. Co. v. Barnard, 209 Fed. 589.

The case of *Hipolite Egg Co. v. United States*, *supra*, did not involve any claim of conflict between the federal and state jurisdictions. But it embodies an analysis of sections 2 and 10 of the Food and Drugs Act which is important. The contention was advanced, that, because the food seized in this case had been in the possession of the consignee for some time and was not intended for direct resale, but was to be used by the consignee for baking purposes, it had passed out of interstate commerce before seizure. The product was still in the original packages, and had been put away in a storeroom with other baking supplies. Meeting the contention thus advanced, this Court said (pp. 57-58):

“Transportation in interstate commerce is forbidden to them (the adulterated goods), and, in a sense, they are made culpable as well as their shipper. It is clearly the purpose of the statute that they shall not be stealthily put into interstate commerce and stealthily taken out again upon arriving at their destination and be given asylum in the mass of property of the State. Certainly not, *when they are yet in the condition in which they were transported to the State*, or, to use the words of the statute, while they remain ‘in the original, unbroken packages.’ In that condition they carry their own identifications as contraband of law. * * *

“* * * There is here no conflict of national and state jurisdictions over property legally articles of trade. The question here is whether articles which are outlaws of commerce may be seized wherever found, and it certainly will not be contended that they are outside of the jurisdiction of the national government when they are within the borders of a State. The question in the case, therefore is, What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of them, or rather to prevent trade in them between the States by denying to them the facilities of interstate commerce. And appropriate means to that end, which we have seen is legitimate, are the seizure and condemnation of the articles at their point of destination *in the original, unbroken packages*. The selection of such means is certainly within that breadth of discretion which we have said Congress possesses in the execution of its powers conferred upon it by the Constitu-

tion. *McCulloch v. Maryland*, 4 Wheat. 316; *Lottery Case*, 188 U. S. 321, 355."

It should be noticed in studying this decision that the phrase "part of the general mass of property of the State" is used with special reference to the facts in the case. It refers to the physical commingling of the interstate shipment by the consignee, while it remains in the original package, with state goods at the place of receipt of the imported articles. This cannot be treated as synonymous with the commingling of imported goods with state goods, which occurs when the original package is broken or it or its contents sold by the consignee.

The case of *McDermott v. Wisconsin*, *supra*, involved a conflict between the misbranding provisions of the Wisconsin statutes and the Food and Drugs Act. The latter act recognized as sufficient a certain label adopted by the manufacturer of the product. The Wisconsin statute required a different label, and forbade the use of any other, thereby requiring the removal of the original label before the product could be sold by the importer.

This Court, construing sections 7 and 8 of the act, determined that the "package" therein referred to, which must bear the specified label, was the immediate container. It then refers to the object of the act—to prevent the misuse of the facilities of interstate commerce in conveying adulterated or misbranded articles to the consumer—and says (pp. 131-132):

"While these regulations are within the power of Congress, it by no means follows that the State is not permitted to make regulations, with a view to the protection of its people against fraud or imposition by impure food or drugs. This subject was fully considered by this court in *Savage v. Jones*, 225 U. S. 501, in which the power of the State to make regulations concerning the same subject-mat-

ter, reasonable in their terms and not in conflict with the acts of Congress, was recognized and stated, and certain regulations of the State of Indiana were held not to be inconsistent with the Food and Drugs Act of Congress. While this is true, it is equally well settled that the State may not, under the guise of exercising its police power or otherwise, impose burdens upon or discriminate against interstate commerce, nor may it enact legislation in conflict with the statutes of Congress passed for the regulation of the subject, and if it does, to the extent that the state law interferes with or frustrates the operation of the acts of Congress, its provisions must yield to the superior federal power given to Congress by the Constitution."

The decision then applies this rule to the alleged conflict between the state and federal regulations. It is pointed out that the label is the evidence that the shipper has complied with the federal act, or else it furnishes the proof of noncompliance upon which he can be punished and the goods condemned. While the goods are still *unsold* the Wisconsin law requires the removal of the original label, thereby destroying this evidence, *while the goods are still under federal control* and the preservation of such evidence is still important. The Court then says (pp. 133-134) :

"The label is the means of vindication or the basis of punishment in determining the character of the interstate shipment dealt with by Congress. While in this situation, *the goods being unsold, as a condition of their legitimate sale within the State, and also of their being in the possession of the importer for the purpose of sale and of being exposed and offered for sale by him*, the Wisconsin statute provides that they shall bear the label required by the state law and none other (which represents a saccharine substance, as do the labels in these cases). In other words, it is essential to a legal exercise of possession of and traffic in such goods under the

state law that labels which presumably meet with the requirements of the federal law and for the determination of the correctness of which Congress has provided effectual means, shall be removed from the packages *before the first sale by the importer*. In this connection it might be noted that as a practical matter, at least, the first time the opportunity of inspection by the federal authorities arises in cases like the present is when the goods, after having been manufactured, put up in package form and boxed in one State and having been transported in interstate commerce, arrive at their destination, are delivered to the consignee, unboxed, and placed by him upon the shelves of his store for sale. Conceding to the State the authority to make regulations consistent with the federal law for the further protection of its citizens against impure and misbranded food and drugs, we think to permit such regulation as is embodied in this statute is to permit a State to discredit and burden legitimate federal regulations of interstate commerce, to destroy rights arising out of the federal statute which have accrued both to the government and the shipper, and to impair the effect of a federal law which has been enacted under the constitutional power of Congress over the subject.

"To require the removal or destruction *before the goods are sold* of the evidence which Congress has, by the Food and Drugs Act, as we shall see, provided may be examined to determine the compliance or noncompliance with the regulations of the federal law, is beyond the power of the State."

The decision then considers the state's contention that, because the goods have been removed from the original package by the consignee at the point of destination, they have passed from the field of federal control, as defined by the "original package" decisions, *even though the goods are still in the possession of the importer and unsold*. Meeting this contention, the Court said (pp. 135-136):

"In the view, however, which we take of this case it is unnecessary to enter upon any extended consideration of the nature and scope of the principles involved in determining what is an original package. For, as we have said, keeping within its constitutional limitations of authority, Congress may determine for itself the character of the means necessary to make its purpose effectual in preventing the shipment in interstate commerce of articles of a harmful character, and to this end may provide the means of inspection, examination and seizure necessary to enforce the prohibitions of the act, and when paragraph 2 has been violated the federal authority, in enforcing either paragraph 2 or paragraph 10, may follow the adulterated or misbranded article *at least to the shelf of the importer.*" * * *

"* * * To make the provisions of the act effectual, Congress has provided not only for the seizure of the goods while being actually transported in interstate commerce, but has also provided for such seizure after such transportation and while the goods remain 'unloaded, unsold, or in original unbroken packages.' The opportunity for inspection en route may be very inadequate. The real opportunity of government inspection may only arise when, as in the present case, the goods as packed have been removed from the outside box in which they were shipped and remain, as the act provides, 'unsold.' It is enough, by the terms of the act, if the articles are *unsold*,* whether in original packages or not. Bearing in mind the authority of Congress to make effectual regulations to keep impure or misbranded articles out of the channels of interstate commerce, we think the provisions of paragraph 10 are clearly within its power. Indeed it seems evident that they are measures essential to the accomplishment of the purpose of the act."

This decision, therefore,

(a) Recognizes the right of the state to make and en-

* Italics appear in original text.

force regulations consistent with the federal act, for the further protection of its citizens.

(b) Limits the operation of the federal act to the point where the imported articles are sold by the importer.

(c) Thus clearly recognizes that the admitted power of supplementary state legislation begins where the field of control asserted by congress ends—namely, at the point where the goods imported are sold by the importer.

The case of *Armour & Co. v. North Dakota*, *supra*, involved a statute of that state requiring lard, when not sold in bulk, to be put up in pails or other containers holding a specified number of pounds net weight, or even multiples thereof, labeled so as truthfully to state the kind of lard contained therein. It was strenuously asserted by the manufacturer that this statute, when applied to interstate shipments, violated the Commerce Clause of the constitution, and particularly the Food and Drugs Act, passed pursuant thereto. Answering this objection, the Court said (p. 517) :

“It is objected that the law violates the commerce clause of the Constitution. This is certainly not true of the sale to Ladd. It was distinctly by retail and in the package of retail, not in the package of importation. And it is to such retail sales the statute is directed. It does not attempt to regulate the transportation to the State.

“Nor do we think that the law is repugnant to the Pure Food and Drugs Act of June 30, 1906 (c. 3915, 34 Stat. 768, 780). That act is directed against the adulteration and misbranding of articles of food transported in interstate commerce. The state statute has no such purpose; it is directed to the manner of selling at retail, which is in no way repugnant to the federal law. (*Rast v. Van Deman & Lewis*, *ante*, p. 342), and the operation of that law is in no way displaced or interfered with.”

The following cases are also in point under closely analogous facts:

Hebe Co. v. Calvert, 246 Fed. 711;

Ex parte Agnew, 131 N. W. (Neb.) 817.

It is submitted, therefore, that there exists no conflict between the challenged statutes of the state of Wisconsin and the Food and Drugs Act. The fact that administrative officers, proceeding under the act, have declared benzoate of soda to be harmless as a food ingredient, and have permitted foods containing it to be manufactured and transported, while the state has taken the opposite view and forbidden the sale of such foods in intrastate transactions does not constitute *conflict*. For that depends, not on the nature of the regulations, but upon the respective fields in which it is sought to make them operative. Each determination is supreme in its own sphere and freely operative therein, unhindered by the other regulation.

There cannot be here any interference with the operation of the federal act by the state prohibition, as there was in the *McDermott* case. There the state statute, as there construed, attempted to enter the federal field and exert powers of regulation therein, conflicting with the federal requirements. In the case of the state statutes here involved, there is no attempt to regulate the product until it has left the field of federal control.

The question of whether congress might have followed the imported article farther than it did in the Food and Drugs Act, that is, beyond the "original unbroken package" or the point where the product remains "unloaded, unsold or in original unbroken packages," while interesting, is not before us. Congress has by the foregoing language, clearly defined and bounded its field of con-

trol. The state does not seek to interfere in any way with the control thus assumed, but merely asserts its inherent power to regulate the product after the federal control has ceased to be operative. Hence the state statutes, being a legitimate exercise of the police power of the state and not displacing or in any way interfering with the control exercised by congress, are valid.

Respectfully submitted,

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APPENDIX

I. THE FOOD AND DRUGS ACT WITH THE SHERLEY AND GOULD AMENDMENTS.

AN ACT For preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be unlawful for any person to manufacture within any Territory or the District of Columbia any article of food or drug which is adulterated or misbranded, within the meaning of this Act; and any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor, and for each offense shall, upon conviction thereof, be fined not to exceed five hundred dollars or shall be sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court, and for each subsequent offense and conviction thereof shall be fined not less than one thousand dollars or sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court.

Sec. 2. That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of

any article of food or drugs which is adulterated or misbranded, within the meaning of this Act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this Act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court: *Provided*, That no article shall be deemed misbranded or adulterated within the provisions of this Act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped; but if said article shall be in fact sold or offered for sale for domestic use or consumption, then this proviso shall not exempt said article from the operation of any of the other provisions of this Act.

Sec. 3. That the Secretary of the Treasury, the Sec-

retary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this Act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia, or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended for shipment to any foreign country, or which may be submitted for examination by the chief health, food, or drug officer of any State, Territory, or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country.

Sec. 4. That the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such Bureau, for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this Act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this Act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample is obtained. Any party so notified shall be given an opportunity to be heard, under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this Act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney,

with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer. After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid.

Sec. 5. That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this Act, or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia shall present satisfactory evidence of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided.

Sec. 6. That the term "drug" as used in this Act, shall include all medicines and preparations recognized in the United States Pharmacopoeia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals. The term "food," as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed or compound.

Sec. 7. That for the purposes of this Act an article shall be deemed to be adulterated:

In case of drugs:

First. If, when a drug is sold under or by a name recognized in the United States Pharmacopoeia or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopoeia or Na-

tional Formulary official at the time of investigation; *Provided*, That no drug defined in the United States Pharmacopoeia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopoeia or National Formulary.

Second. If its strength or purity fall below the professed standard or quality under which it is sold.

In the case of confectionery:

If it contains terra alba, barytes, tale, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound or narcotic drug.

In the case of food:

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Second. If any substance has been substituted wholly or in part for the article.

Third. If any valuable constituent of the article has been wholly or in part abstracted.

Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: *Provided*, That when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed me-

chanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this Act shall be construed as applying only when said products are ready for consumption.

Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.

Sec. 8. That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this Act an article shall also be deemed to be misbranded:

In the case of drugs:

First. If it be an imitation of or offered for sale under the name of another article.

Second. If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.

In the case of food :

First. If it be an imitation of or offered for sale under the distinctive name of another article.

Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any of such substances contained therein.

Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. In the case of articles labeled, branded, or

tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale: *Provided*, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: *And provided further*, That nothing in this Act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding.

Sec. 9. That no dealer shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this Act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines and other penalties which would attach, in due course, to the dealer under the provisions of this Act.

Sec. 10. That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this Act, and is being transported from one State, Territory, District, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, or if it be sold

or offered for sale in the District of Columbia or the Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this Act, the same shall be disposed of by destruction or sale, as the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States, but such goods shall not be sold in any jurisdiction contrary to the provisions of this Act or the laws of that jurisdiction: *Provided, however,* That upon the payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold or otherwise disposed of contrary to the provisions of this Act, or the laws of any State, Territory, District, or insular possession, the court may by order direct that such articles be delivered to the owner thereof. The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all proceedings shall be at the suit of and in the name of the United States.

Sec. 11. The Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request from time to time, samples of foods and drugs which are being imported into the United States or offered for import, giving notice thereof to the owner or consignee,

who may appear before the Secretary of Agriculture, and have the right to introduce testimony, and if it appear from the examination of such samples that any article of food or drug offered to be imported into the United States is adulterated or misbranded within the meaning of this Act, or is otherwise dangerous to the health of the people of the United States, or is of a kind forbidden entry into, or forbidden to be sold or restricted in sale in the country in which it is made or from which it is exported, or is otherwise falsely labeled in any respect, the said article shall be refused admission, and the Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction of any goods refused delivery which shall not be exported by the consignee within three months from the date of notice of such refusal under such regulations as the Secretary of the Treasury may prescribe: *Provided*, That the Secretary of the Treasury may deliver to the consignee such goods pending examination and decision in the matter on execution of a penal bond for the amount of the full invoice value of such goods, together with the duty thereon, and on refusal to return such goods for any cause to the custody of the Secretary of the Treasury, when demanded, for the purpose of excluding them from the country, or for any other purpose, said consignee shall forfeit the full amount of the bond: *And provided further*, That all charges for storage, cartage, and labor on goods which are refused admission or delivery shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any future importation made by such owner or consignee.

Sec. 12. That the term "Territory" as used in this Act shall include the insular possessions of the United States. The word "person" as used in this Act shall

be construed to import both the plural and the singular, as the case demands, and shall include corporations, companies, societies and associations. When construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any corporation, company, society, or association, within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such corporation, company, society, or association as well as that of the person.

Sec. 13. That this Act shall be in force and effect from and after the first day of January, nineteen hundred and seven.

Approved June 30, 1906.

SHERLEY AMENDMENT.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That that part of section eight of the Food and Drugs Act of June thirtieth, nineteen hundred and six, defining what shall be misbranding in the case of drugs, be, and the same is hereby, amended by adding thereto a third paragraph to read as follows:

“If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.”

So that the said part of said section eight shall read as follows:

“Sec. 8. That the term ‘misbranded,’ as used herein, shall apply to all drugs or articles of food or articles which enter into the composition of food, the package or label of which shall bear any state-

ment, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

“That for the purposes of this Act an article shall also be deemed to be misbranded. In case of drugs:

“First. If it be an imitation of or offered for sale under the name of another article.

“Second. If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.

“Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.”

Approved, August 23, 1912.

GOULD AMENDMENT.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section eight of an Act entitled “An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes,” approved June thirtieth, nineteen hundred and six, be, and the same is hereby, amended by striking out the words “Third.

If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package," and inserting in lieu thereof the following:

"Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: *Provided, however,* That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of Section three of this Act.

"Sec. 2. That this Act shall take effect and be in force from and after its passage: *Provided, however,* That no penalty of fine, imprisonment, or confiscation shall be enforced for any violation of its provisions as to domestic products prepared or foreign products imported prior to eighteen months after its passage."

Approved, March 3, 1913.

II. FOOD INSPECTION DECISION NO. 104.

The Referee Board of Consulting Scientific Experts, composed of Dr. Ira Remsen, Dr. Russell H. Chittenden, Dr. John H. Long, Dr. Alonzo E. Taylor, and Dr. C. A. Herter, have reported upon the use of benzoate of soda in foods. The board reports, as a result of three extensive and exhaustive investigations, that benzoate of soda mixed with food is not deleterious or poisonous and is not injurious to health. The summary of the report of the referee board is published herewith.

It having been determined that benzoate of soda mixed with food is not deleterious or poisonous and is not in-

injurious to health, no objection will be raised under the Food and Drugs Act to the use in food of benzoate of soda, provided that each container or package of such food is plainly labeled to show the presence and amount of benzoate of soda.

Food Inspection Decisions 76 and 89 are amended accordingly.

THE INFLUENCE OF SODIUM BENZOATE ON THE NUTRITION AND HEALTH OF MAN.

Of the questions referred to this board the first to engage our attention have been the following:

(1) "Does a food to which there has been added benzoic acid, or any of its salts, contain any added poisonous or other added deleterious ingredient which may render the said food injurious to health? (a) In large quantities? (b) In small quantities?"

(2) "If benzoic acid or any of its salts be mixed or packed with a food, is the quality or strength of said food thereby reduced, lowered, or injuriously affected? (a) In large quantities? (b) In small quantities?"

• • •

The main general conclusions reached by the referee board are as follows:

First. Sodium benzoate in small doses (under 0.5 gram per day) mixed with the food is without deleterious or poisonous action and is not injurious to health.

Second. Sodium benzoate in large doses (up to 4 grams per day) mixed with the food has not been found to exert any deleterious effect on the general health, nor to act as poison in the general acceptance of the term. In some directions there were slight modifications in

certain physiological processes, the exact significance of which modifications is not known.

Third. The admixture of sodium benzoate with food in small or large doses has not been found to injuriously affect or impair the quality or nutritive value of such food.

IRA REMSEN, *Chairman,*

RUSSELL H. CHITTENDEN,

JOHN H. LONG,

CHRISTIAN A. HERTER,

Referee Board of Consulting Scientific Experts.

III. REGULATION NO. 15 (c)

(c) It having been determined that benzoate of soda mixed with food is not deleterious or poisonous and is not injurious to health, no objection will be raised under the food and drugs act to the use in food of benzoate of soda, provided that each container or package of such food is plainly labeled to show the presence and amount of benzoate of soda. Food Inspection Decisions 76 and 89 are amended accordingly.

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IN THE

Supreme Court of the United States

October Term, 1917.

No. 342.

GEORGE J. WEIGLE,

Appellant,

v.

CURTICE BROTHERS COMPANY,

Appellee.

**Appeal from the District Court of the United States
for the Western District of Wisconsin.**

REPLY BRIEF FOR APPELLANT.

Some portions of the brief and argument for the appellee necessitate this reply. Contentions advanced by the appellee as to which the appellant's position sufficiently appears from his brief already filed, will not be discussed in this brief.

Analysis of appellee's argument preliminary to a reply thereto.

Points I, II and III of appellee's brief, covering pages 6 to 29, inclusive, may be summarized by the following paragraph.

The challenged state statutes occupy a part of the field of regulation covered by the Food and Drugs Act (pp. 9-13). Within the field thus covered by the federal act, the federal agencies (whether courts, administrative officers, or both), acting under the provisions of the federal act, have the exclusive power and authority to determine the character of appellee's food products (pp. 13-29). Hence the challenged state statutes, because they forbid the sale of such products on the grounds of their alleged deleterious character, are void (pp. 13-14).

The primary and essential weakness in this argument lies in the first assertion, upon which the balance of the argument rests. An examination of pages 9 to 13 of appellee's brief makes it clear that the sole basis of the assertion that the challenged state statutes occupy part of the same field as the federal act is that both the state and federal legislation seek to prevent deception in food products and to protect the public health by defining and denouncing adulteration, and that the state statute, in line with such declared purpose, denounces the use of benzoate of soda in foods.

Of course, this ignores the fact that the state statutes in question do not become operative until the federal control has ceased, and thus the state and federal statutes, though they may operate on the same product, do not occupy the same field, because they do not operate at the same time.

The argument thus advanced in pages 6 to 29 of the appellee's brief manifestly depends for support and validity upon points IV and V of the brief (pp. 29-63), and will be considered in connection with those two points. The appellee there makes the following assertions upon which its case very largely depends:

(a) The misbranding or adulteration of the contents of the immediate container of appellee's product being forbidden and penalized by the Food and Drugs Act, *all sales* of such product, whether in the unbroken immediate container or the package of shipment are within sec. 10 (if not sec. 2) of the federal act, notwithstanding the so-called "original package" and "first sale" rule of the courts (pp. 29-51).

(b) The whole journey of the product from the appellee to the Wisconsin consumer, whether such product be in the package of shipment or the immediate container, and without regard to the number of sales of it which may be made, continues within the regulations of sec. 10 of the federal act, as to adulteration and misbranding (pp. 55-63).

Manifestly these two points are so closely allied that they can be answered together. They are thus considered at pages 8 to 25 of this brief. The subdivisions of the appellee's brief covered on pages 69 to 72 thereof, inclusive, seeking to define the term "original packages," are also properly referable to points IV and V (pp. 29-63) above summarized. This is likewise true of the contention advanced as point VII (pp. 72-74) that unless the immediate container is considered as one of the "original packages," the penalties of the federal act are not coextensive with its pro-

hibitions. Each of these sections of appellee's brief will be considered and answered in connection with points IV and V.

Two other points in the brief of the appellee warrant separate notice. The first (point VI) is the contention that the power of congress as to contrabands of commerce knows no bounds; that the federal act deals with such outlaws; that the federal authority may follow them to the consumer; and hence the federal jurisdiction negatives all right of state control (pp. 63-69). This argument is considered at pages 26 to 32 of this brief.

The other contention made by appellee (point XII, pp. 82-89) is that a restaurant keeper has the legal right to use, on his tables and lunch counters, such of appellee's food products as he has purchased (whether in immediate containers or packages of shipment) for such use. This assertion is of course met and answered by the fact that the federal control is not asserted by the act beyond the period of custody by the importer. However, there are also other reasons why this contention of the appellee is utterly untenable, and it therefore receives brief individual consideration at pages 33 to 35 hereof.

As indicated by this analysis of the brief of appellee, this reply will be developed upon the following

OUTLINE OF ARGUMENT

I

The field occupied by the state statutes challenged is not identical with any part of the field covered by the federal act.

1. *The field of a legislative enactment is the realm within which it purports to be legitimately operative; its definition in the case of any particular act must be determined from a consideration of the subjects upon which, and the period and territory within which the act, read in the light of the purpose of and authority for its adoption, purports to operate.*

2. *The fact that both the state statutes challenged and the Food and Drugs Act seek to safeguard the public health, that both define adulteration, and that both assert control over the same product does not establish that the fields of the two systems are identical in whole or in part.*

3. *The field of the Food and Drugs Act as regards interstate commerce is not defined or determined by sections 7 and 8 of the act, but primarily by sections 2 and 10 thereof.*

4. *Sections 2 and 10 of the Food and Drugs Act do not include the immediate container as an "original unbroken package," or manifest an intent to regulate its transportation or sale, except in the package of shipment.*

5. *There is not a single decision of a state or federal court which holds that the immediate container is an*

“original unbroken package” within sections 2 and 10 of the Food and Drugs Act, or which asserts or extends the control of the act over products shipped in interstate commerce, after they have left the possession of the importer.

6. *The construction of sections 2 and 10 of the Food and Drugs Act urged by the appellant is not open to the objection that it renders the penalties of the act not coextensive with its prohibitions.*

7. *The construction of sections 2 and 10 of the Food and Drugs Act urged by the appellant will not tend to limit or defeat the purpose of congress in the enactment of the act.*

II

The fact that adulterated or misbranded foods or drugs, entering a state through the channels of interstate commerce, become contrabands of commerce does not prevent the state from regulating internal commerce in foods and drugs received from other states, or from denying to some of them the facilities of such commerce, where the protection of its citizens requires such action.

1. *Assuming (purely for purposes of argument) that in enforcing the Food and Drugs Act the federal authorities may follow the article received through interstate commerce all the way to the consumer for purposes of seizure and destruction, that does not extend the field of federal regulation to the consumer, or prevent the state from denouncing and seizing the same article in its progress from the importer to the consumer.*

2. *Section 10 of the Food and Drugs Act does not authorize the seizure of contraband articles of food or drugs after they have left the possession of the importer.*

III

The sale of appellee's product by a hotel or restaurant keeper to his guest is subject to state regulation in the same manner as the sale at retail of any other article of food within the state.

ARGUMENT

I

The field occupied by the state statutes challenged is not identical with any part of the field covered by the federal act.

It is not intended to cover again in this brief the ground covered by the subdivisions III and V of appellant's main brief. However, the first five points (pp. 6-69) of the brief of appellee are based upon a seeming entire misconception of the meaning of the phrase "field of an act" and especially of that phrase as applied to the state and federal legislation in question. The resultant error is absolutely fundamental, and therefore necessitates consideration in this reply brief of the reasoning of the appellee and its application to the Food and Drugs Act.

1. *The field of a legislative enactment is the realm within which it purports to be legitimately operative; its definition in the case of any particular act must be determined from a consideration of the subjects upon which, and the period and territory within which the act, read in the light of the purpose of and authority for its adoption, purports to operate.*

These principles are elementary and academic. They need no elaboration by extended discussion or citation of authority. They will doubtless not be disputed. They are stated here, however, because an apparent

failure on the part of the appellee to appreciate and apply them to the state and federal statutes under discussion has resulted in a completely erroneous interpretation of those statutes. Leaving these principles with the mere statement of them, we proceed to point out specifically wherein the appellee has failed to apply them properly in this case.

2. *The fact that both the state statutes challenged and the Food and Drugs Act seek to safeguard the public health, that both define adulteration, and that both assert control over the same product does not establish that the fields of the two systems are indetical in whole or in part.*

The greater part of pages 6 to 29 of appellee's brief is devoted to an argument for the exclusive jurisdiction of the Food and Drugs Act over appellee's products shipped into Wisconsin in interstate commerce on the ground that the federal act has occupied the whole field covered by the state statutes. And this assertion is directly based upon the argument that the two enactments occupy the same field because both seek to protect the public health, both define adulteration and both purport to regulate the product manufactured by the appellee.

The appellee is in error in assuming that these marks of similarity establish any measure of identity in the fields of this state and federal legislation or form the basis for any possibility of conflict between them.

Manifestly the mere fact that both sets of statutes seek to protect the public health and in so doing define adulteration does not establish such identity, else no state could legislate as to purity in foods of domestic

origin. Appellee's contention is clearly based upon the fact that both the state statutes and the Food and Drugs Act regulate the same product. But it is easy to demonstrate conclusively that this does not establish identity of field. Assume, for example, that the federal act had expressly provided that none of its provisions should be operative upon goods shipped in interstate commerce after such goods left the possession of the carrier at the point of destination. Under such a provision the state would be free to impose local regulations operative upon those very goods from the very moment they left the carrier's hands. And it could not be claimed for a moment that the state statutes imposing such regulations, though they had the same purpose as the federal act and controlled the same product over which the federal act had exercised its control, occupied any portion of the *field* of the federal act. The fields of the two acts would be concededly distinct *because the periods during which they were operative upon the product were not coincident, but successive.*

This is the vital point of distinction which appellee has ignored in the portion of his brief last referred to. The real question at issue therefore is: Do the challenged state statutes seek to regulate the appellee's product during the period when it is regulated by the Food and Drugs Act, or to interfere with the regulation asserted by that act? This brings us directly to a consideration of appellee's interpretation of the act, embodied principally in points IV and V of its brief. We pass at once to a consideration of that portion of the opposing brief, passing without comment the extensive discussion of the scope and effect of the regulations of the secretary of agriculture and of the three secretaries (pp. 14-27). For the power of these secretaries was

“undoubtedly one of regulation only—an administrative power only—not a power to alter or add to the act.”* (*United States v. Antikamnia Co.*, 231 U. S. 654, 666.) Manifestly, therefore, any regulations of these administrative officers can have neither force nor effect beyond the field of the federal act itself, and the primary question is the limits of the legislative field which congress has assumed to occupy through the Food and Drugs Act.

3. *The field of the Food and Drugs Act as regards interstate commerce is not defined or determined by sections 7 and 8 of the act, but primarily by sections 2 and 10 thereof.*

The appellee devotes a large share of the argument appearing under points IV and V of its brief to a contention which may be fairly summarized as follows:

(a) The federal act in and by sections 7 and 8 thereof recognizes and regulates the immediate container, in connection with the definitions of misbranding and adulteration therein set forth.

(b) The federal act in and by sections 2 and 10 thereof forbids the interstate transportation and the sale by the importer of any adulterated or misbranded products while in the original unbroken packages, penalizing both the person and the property which offends.

(c) It must follow that congress thereby included the immediate container as an “original unbroken package.”

(d) This view is supported by the fact that the

*Note: Italics appearing in this brief are ours, unless otherwise noted.

purpose of the federal act was to protect the consumer, and this can only be accomplished by considering the immediate container one of the "original unbroken packages."

(c) This view finds support in the decisions of this Court, particularly in *McDermott v. Wisconsin*, 228 U. S. 115.

This course of reasoning is really met and answered by subdivision III of the appellant's main brief, construing and defining the field of the Food and Drugs Act. It is not our purpose to duplicate or even to review that argument here. We desire briefly, however, to discuss, under this and the following subsections, this portion of appellee's argument and point out some of the respects wherein it is involved in error.

The Food and Drugs Act, so far as it operates on interstate commerce does not forbid or penalize at all adulteration or misbranding of foods or drugs. The realization of this fact is vital to a true understanding of sections 7 and 8 of the act.

As this Court has very recently said:

"The statute does not attempt to make either kind of misbranding *unlawful in itself*, but does
• • • make it unlawful *to ship or deliver for shipment from one state to another* an article of food which is misbranded in either way."

Weeks v. United States, 245 U. S. 618, 622.

The offense under the act lies not in the adulteration or the misbranding, but in interstate shipment or the sale by the importer of adulterated or misbranded goods. Hence it is not to sections 7 and 8 of the act, defining adulteration or misbranding, that we must look to determine the acts denounced, but to sections 2 and

10 which define the offense and declare the penalty. (See pp. 41 and 78, *et seq.*, Appellant's Main Brief.)

Sections 7 and 8 undoubtedly deal with the individual container, but not, as appellee contends, for the purpose of defining it as a "package of interstate commerce" or as an "original unbroken package." The sole purpose of those sections was to define the essential character of the manufactured article by the declaration of certain standards relative to the composition or the name and description of such article. Sections 7 and 8 concern themselves wholly with the *production* of the article of commerce, and not at all with interstate traffic in it, and the word "package" therein used is limited accordingly.

Sections 2 and 10 are the sections which regulate interstate shipments and they alone define the extent of the regulations imposed. Sections 2 and 10 *are complete in themselves* in this respect, except only as they look to sections 7 and 8 for the standards as to what constitutes adulteration or misbranding of the product shipped. Manifestly, therefore, the field of the federal act is determined by the provisions of the two former, rather than of the two latter sections.

4. *Sections 2 and 10 of the Food and Drugs Act do not include the immediate container as an "original unbroken package," or manifest an intent to regulate its transportation or sale, except in the package of shipment.*

The appellee repeatedly asserts the reverse of this assertion, but refrains from entering into any detailed discussion or analysis of the text of these two sections, upon which the truth of either contention must depend.

This subject receives extended consideration at pages 34, *et seq.*, and 73, *et seq.*, of appellant's main brief. The only portion of our analysis met and discussed in the brief of appellee is that relative to the resale of confiscated articles. (Appellee's Brief, pp. 80-81.)

It cannot be denied that the very text of these sections shows that congress had under consideration something entirely distinct from the immediate container referred to in sections 7 and 8 of the act. In addition to the reasons for this assertion pointed out in the portions of our main brief just referred to, the very fact of the use of a distinctive term at all in sections 2 and 10, other than the common term "package," refutes appellee's contention. It is impossible to conceive of any reason for the use of this peculiar phrase "original unbroken packages," if congress simply meant to describe "packages" generally, whether consisting of one or many units.

Furthermore, if congress intended that the term "original unbroken package" should include the immediate container, why did it studiously drop this phraseology when it prohibited sales in the territories or in the District of Columbia, where it could exercise police power? If the phrase already used covered every package—was broad enough even to cover a sale by a restaurant keeper of an open single bottle to his guest—there was surely no need of abandoning the phraseology because it was *restrictive*.

We assert confidently and without further analysis that the text of these sections, considered without extrinsic aids to interpretation, conclusively refutes appellee's claim that the immediate container is one of the "original unbroken packages" referred to therein. That phrase refers exclusively to the package of shipment.

5. *There is not a single decision of a state or federal court which holds that the immediate container is an "original unbroken package" within sections 2 and 10 of the Food and Drugs Act, or which asserts or extends the control of the act over products shipped in interstate commerce, after they have left the possession of the importer.*

The appellant has studiously sought to find support for its contention that the act follows the immediate container all the way to the consumer. In this effort brief extracts are quoted from several decisions and coupled with an interpretation whereby appellant seeks to make them support its contention. But no authority which, on reading the whole decision, offers even apparent support to appellant's contention can be found, except, of course, the case of *Corn Products Co. v. Weigle*, 221 Fed. 988, decided by the same judge from whose decree this appeal has been taken.

Again and again the appellee seeks to maintain this contention by quoting from the case of *McDermott v. Wisconsin*, 228 U. S. 115. (See pp. 42, 43, 45, 46, 55, 68, Appellee's Brief.) The last quotation is especially significant. The appellant there says:

"It would seem that this court expressly determined the meaning of the words 'original packages' when in *McDermott v. Wisconsin*, it said, p. 130:

"That the word 'package' or its equivalent expression, as used by Congress in sections 7 and 8 in defining what shall constitute adulteration and what shall constitute misbranding within the meaning of the act, clearly refers to the immediate container of the article which is intended for consumption by the public, there can be no question.' "

It is indeed difficult to understand how this quotation can be cited as a definition of the term "original package." This court was not there discussing either the term "original package" or the sections of the act in which that term appears. It would have been enlightening and helpful in determining the point in question if appellee had included the very next sentence of the opinion in the quotation. This court there said:

"And it is sufficient for the decision of these cases, that we consider the extent of the word package *as thus used only*, and we therefore have no occasion, and do not attempt, to decide *what Congress included in the terms 'original unbroken package' as used in the second and tenth sections and 'unbroken package' in the third section.*"

The application of this quotation is too clear to require comment.

The appellant at pages 42-46 of its brief again quotes at length from the *McDermott* case in an endeavor to find support for its contention that the immediate container is defined as a package of interstate commerce within sections 2 and 10 of the act. Without considering the quotations in detail, it is sufficient to say that there is no language in this case which, fairly considered, lends the least support to appellee's contention.

This Court was dealing in the *McDermott* case with a state statute which required the destruction of the brand required by the federal act *before the product left the importer*. This Court determined that the federal control under section 10 of the act continued while the goods remained in the importer's possession "*unless*" * whether in original packages or not" (p. 136), and that federal control might follow "the adulterated or mis-

*Italics appear in original text.

branded article at least to the shelf of the importer" (p. 135).

So far as this language is at all decisive of the point under discussion, it refutes appellee's contention, for it recognizes no federal control beyond the possession of the article by the importer. And by the very language above quoted, "unsold, whether in original packages or not" it is apparent that the Court was differentiating as between the package of shipment, and its contents (the immediate containers) after removal therefrom and before sale, denominating only the package of shipment as the "*original package*."

Appellant attempts to construe the following language of the *McDermott* case as an interpretation of the Food and Drugs Act warranting the assertion of federal control over the product all the way to the consumer:

"Within the limitations of its right to regulate interstate commerce, Congress manifestly is aiming at the contents of the package, as it shall reach the consumer, for whose protection the Act was primarily passed, and it is the branding upon the article intended for consumption itself which is the subject matter of the regulation." (Appellee's Brief, pp. 45-46.)

Appellee fails to realize the force of the limitation with which this sentence is advisedly begun, being the words italicized. It was because of the full realization of that limitation by congress and a desire to abide within those limits, that it carefully defined its control under section 10 of the act as extending no farther than the period of possession of the goods by the importer, "unsold, whether in original packages or not." (*McDermott v. Wisconsin*, *supra*, p. 136.)

Appellee next refers to the case of *Seven Cases v.*

United States, 239 U. S. 510, 515, as removing any doubt that might otherwise exist that this Court in the *McDermott* case construed the Food and Drugs Act in line with its contentions. (See p. 47, Appellee's Brief.) Again the quotation is limited to a single sentence.

"The further contention that Congress may not deal with the package, thus transported, in the sense of the immediate container of the article as it is intended for consumption, is met by *McDermott v. Wisconsin*, 228 U. S. 115."

Just how this quotation lends support to appellee's contention it is difficult to see. Congress may deal with the individual container; it has dealt with it in great detail in sections 7 and 8 of the federal act, as we have pointed out in our analysis of those sections in our main brief. But it has nowhere declared expressly or impliedly that the immediate container is an "original unbroken package" within sections 2 and 10 of the act, nor has it at any point declared its intention to follow the product in such container beyond the possession of the importer.

Nor is there anything in the case last cited which so holds or intimates. The decision so far as it relates at all to the subject under discussion can be well summarized by quoting part of the second and third head notes:

"The Sherley Amendment of August 23, 1912, to the Food and Drugs Act under which misbranding includes false and fraudulent statements regarding curative effects of drugs is within the power of Congress to regulate interstate • • • commerce • • • whether the statement be contained in the original package or on the containers of the article. See *McDermott v. Wisconsin*, 228 U. S. 115."

Thus, when the actual point decided is before us, it is apparent that it not only does not support, but refutes appellee's contention, for it distinguishes between the "original package" and the "container," which is of course inconsistent with the claim that the container is an original package in the meaning of the act.

Rast v. Van Deman & Lewis, 240 U. S. 342, 362, is the next case referred to by appellee, and a single sentence is quoted from the opinion. The sentence refers to the *McDermott* case and the Court says that congress in the Food and Drugs Act defined "what the 'package' of commerce should be," and any state regulation in conflict therewith is void. (Appellee's Brief, pp. 47-48.) This, of course, refers again wholly to the provisions of sections 7 and 8, as is perfectly clear from the latter half of the quotation. This same case is cited in our main brief at pages 81 and 113 to the very opposite of appellee's contention. Appellee at page 48 attempts to distinguish it, on the ground that the federal statute referred to in the *Rast* case showed no attempt by congress to enforce its permission to the goods in question to travel the channels of internal commerce of the state. This does not serve to distinguish the *Rast* case, because

(a) This Court there held that congress could not enforce such permission if it would (*Rast* case, p. 362); and

(b) Congress has not by any language in the Food and Drugs Act enforced its permission to appellee's product to travel the channels of the domestic commerce of Wisconsin.

The last case cited by appellee to support its contention that the immediate container is an "original unbroken package" and that the federal act asserts juris-

diction over it all the way to the consumer is *Price v. Illinois*, 238 U. S. 446, cited at page 49, appellee's brief. The quotation there given so evidently fails to support the proposition to which it is cited as to require no special comment.

These are all the cases appellee has been able to cite. We again assert that no one of them and no other adjudication holds to the interpretation of the federal act for which the appellee contends. We have cited and in some instances quoted at pages 81, *et seq.*, and 115, *et seq.*, of our main brief, from a number of cases which directly or in effect repudiate the construction of the Food and Drugs Act urged by appellee and assert and apply the construction for which we contend. No useful purpose would be served by considering them again in this brief. We desire to add to them the case of —

United States v. Two Barrels, 185 Fed. 302, 308, where it was held that the jurisdiction of the federal government under section 10 of the act over goods shipped in interstate commerce continues while the articles remain "*at their point of destination* in the original unbroken packages." This conclusively negatives any construction of this section which would follow the goods all the way to the consumer.

Also the case of *United States v. Five Boxes*, 181 Fed. 561, 565, *et seq.* This was a libel filed by the government under section 10 of the Food and Drugs Act. It was urged that the fact that the boxes of shipment (containing a number of individual containers) had been opened by the importer and samples removed for purposes of testing served to terminate the status of the shipment as "original unbroken packages" and to incorporate the goods into the mass of property in the

state. The court considers this contention at length, distinguishing between cases where the original package is opened merely for testing and cases where it is opened and one or more containers removed and sold or used. It concludes that while in the latter case the package of shipment *would no longer be an "original unbroken package" within section 10 of the act, and the federal jurisdiction over it would be ended*, in the former case this is not true, for the "commercial form" of the original package was not thereby destroyed.

6. *The construction of sections 2 and 10 of the Food and Drugs Act urged by the appellant is not open to the objection that it renders the penalties of the act not coextensive with its prohibitions.*

This criticism of appellant's position is made at pages 72-74 of appellee's brief. In fact, appellee there asserts that under the construction of the act we assert, its penalties cover *none* of its prohibitions. This is a rather startling assertion in view of the indisputable fact that approximately five thousand prosecutions have proceeded to judgment under either section 2 or section 10 of the act; that in these prosecutions the act has been practically interpreted and administered in accordance with our construction of it (see Appellant's Main Brief, pp. 86-89) and that *in the vast majority of those cases penalties have actually been imposed* by way of fines which have been paid or seizures which have been suffered. It is certainly strange that a construction open to so glaring a defect could be so long enforced without successful challenge.

The fallacy in the entire argument with which appellee seeks to support this criticism of our interpreta-

tion of sections 2 and 10 of the act lies in the failure to realize that the act does not attempt, so far as interstate commerce is concerned, to forbid or penalize misbranding or adulteration as such. (*Weeks v. United States*, 245 U. S. 618, 622.) It is the interstate transportation of the misbranded or adulterated article or its sale by the importer upon the conclusion of such transportation with which both the prohibitions and the penalties of the act are alone concerned. As has already been said (p. 13, *supra*), sections 2 and 10 are thus complete in themselves, except as they refer to sections 7 and 8 for the standards there established. When it is realized that it is sections 2 and 10, and not sections 7 and 8 of the act (as is contended at page 73 of appellee's brief) which "contain . . . definition of the things prohibited by the act," and that the same sections (2 and 10) prescribe and impose the penalties, the difficulty suggested by appellee disappears.

7. *The construction of sections 2 and 10 of the Food and Drugs Act urged by the appellant will not tend to limit or defeat the purpose of congress in the enactment of the act.*

This criticism is advanced by appellee repeatedly. (Appellee's Brief, pp. 37-38, 55, *et seq.*) It is based upon the persistent assumption by appellee that congress considered itself burdened with the entire and exclusive responsibility of protecting the public against impure and misbranded foods and drugs; and that it sought to discharge this burden by the adoption of legislation designed to provide a complete and exclusive system of regulation and control over every article of food or drugs shipped in interstate commerce from the initia-

tion of its journey with the manufacturer to the termination thereof with the consumer. However desirable such a plan might be, it was, of course, far indeed from the purpose of congress in the adoption of the Food and Drugs Act. Nor could it constitutionally adopt legislation of such unlimited scope if it desired to do so. (Appellant's Main Brief, pp. 27-33.)

It must constantly be borne in mind that congress found the field of regulation of foods and drugs shipped into the states fairly well occupied and the health and welfare of the people of the several states fairly well protected, so far as regulation of intrastate commerce could accomplish that result, before it adopted the Food and Drugs Act. We have considered this entire matter elaborately in our main brief, pages 41-66. The purpose of congress was not to supplant, but to supplement the efforts of the states, and to legislate against impure and adulterated foods and drugs in a field where the states were powerless—the field of interstate transportation. This is the outstanding fact in the entire legislative history of the act. Nor can appellee brush this history aside as lightly as it seeks to do at pages 74 to 76 of its brief. This Court has sought the aid of the legislative history of this very act in its interpretation.

Seven Cases v. United States, 239 U. S. 510, 515;

United States v. Johnson, 221 U. S. 488, 503.

(Dissenting opinion)

This aim of supplementing state regulation of intrastate trade in food and drugs received from sister states by effective regulation of the interstate traffic therein has been well accomplished by the Food and Drugs Act. The act has been practically construed in its administration, not as the appellee claims it should be, but as limited to the interstate transportation of the

product, ending with the termination of the custody thereof by the importer. Thus practically construed and administered, it has fully justified its enactment and accomplished its designed objects. Its essential purpose is, as appellee repeatedly asserts, to protect the consumer, and it has accomplished that purpose effectually by preventing impure or misbranded food and drugs from entering the internal commerce of the state in which the consumer lives.

There was and is no need for the federal act to follow the product into the channels of intrastate trade, even if it could lawfully do so. The state codes, enacted by the very citizens for whom protection is to be afforded, are operative there in practically every state in the Union at the present time, affording to the people of each state that measure of self protection which they see fit to provide. That such protection afforded to the citizens of the state of Wisconsin is complete and effective is proven by the existence of this very litigation.

The power to regulate food and drugs asserted by congress in the federal act must find its justification in the commerce clause of the federal constitution. It is true that regulations of interstate commerce may take the form of police regulations. But in every instance they must be tested as to their legitimacy not by the police power, which belongs exclusively to the states, but by the power to regulate commerce "*among the several states.*" In considering an argument like that here advanced by the appellee, favoring the assertion and assumption of control by congress over the strictly intrastate transactions in an article of food or drugs, and the continuance of such control until it reaches the ultimate consumer, these distinctions as to state and federal jurisdiction must be kept clear, for they are

fundamental and decisive. We have considered this whole matter in our main brief (pages 28-33). We refer to it again here to point out that appellee's contention, practically applied, means that congress through the Food and Drugs Act has assumed final and exclusive power to determine for the people of the state the healthfulness and freedom from inferiority of all foods and drugs which have entered the internal commerce of the state from without, and that congress has decided to continue such exclusive control until such foods or drugs actually reach the consumer; all under the guise of an exercise of the power to regulate commerce *among the several states*, and to the exclusion of the police power which belongs peculiarly to the states. The statement of such a contention would seem to constitute a demonstration of its impossibility.

Hammer v. Dagenhart, U. S. Adv. Ops. 1917-1918, p. 660, 663-664.

The essential purpose of the Food and Drugs Act—to protect the consumer by keeping the channels of interstate commerce free from adulterated foods or drugs and by punishing the shipper or seller of any such goods and seizing the goods themselves during their transportation or upon their arrival at their destination while they remain in the hands of the importer unloaded, unsold or in original unbroken packages—all this is within the scope of the act as it has been interpreted for twelve years and as we urge that it should be interpreted in this case.

II

The fact that adulterated or misbranded foods or drugs entering a state through the channels of interstate commerce become contrabands of commerce does not prevent the state from regulating internal commerce in foods and drugs received from other states, or from denying to some of them the facilities of such commerce, where the protection of its citizens requires such action.

The claim is advanced and developed at pages 63-68 of appellee's brief that the "original package" and "first sale" doctrines apply only to legitimate articles of commerce; that an article of food or drugs which is shipped into the state misbranded or adulterated is not a legitimate article of commerce, but a contraband or outlaw; that the power of congress to follow and destroy such contrabands or outlaws after they have entered the channels of interstate commerce knows no bounds; that it may follow them all the way through the channels of intrastate trade to the possession of the consumer and may even take them from his possession; that the statutes of Wisconsin stamp appellee's products with the character of contrabands or outlaws; and that they are therefore under exclusive federal control all the way to the consumer and state regulation cannot attach to them.

There are several answers to this argument :

1. *Assuming (purely for purposes of argument) that in enforcing the Food and Drugs Act the federal author-*

ities may follow the article received through interstate commerce all the way to the consumer for purposes of seizure and destruction, that does not extend the field of federal regulation to the consumer, or prevent the state from denouncing and seizing the same article in its progress from the importer to the consumer.

This contention is reasonable. Why should the state not possess the right to seize and destroy in the channels of its internal commerce an adulterated or misbranded article, which entered those channels through interstate commerce; and this, too, even though the simultaneous existence of a similar right on the part of the federal government be conceded? The admitted purpose of both the state and federal systems is the protection of the consumer against misbranded or adulterated food and drugs. Why should the outlaw food or drug which has escaped the vigilance of the federal authorities be left free to reach the consumer to his detriment? Why should the right of the state to apprehend this same outlaw not be recognized and honored? The object of both systems being the same, the measure of protection afforded the consumer can only be rendered more absolute by their concurrent operation.

And assuming, as we are now doing for the sake of the argument, there should be read into the federal act the right to follow such an outlaw all the way to the consumer, there exists no legal impediment in the concurrent operation of a state statute with a similar purpose, operative upon the contraband article after it leaves the importer and enters the internal commerce of the state. The fields of *regulation* of the two systems would even then not be identical in whole or in part. Appellee's argument confuses regulation with the right

of seizure and confiscation. Federal regulation of interstate shipments under section 10 of the act, interpreted in accordance with our present assumption, terminates with the custody of the article by the importer. The misbranded or adulterated article violates the provisions of the act when it enters the channels of interstate commerce and when it enters the state and remains in the hands of the importer at its destination, unloaded, unsold or in original unbroken packages. It is during this period that it offends and is stamped by the act with its outlaw character and its status thereby becomes established. This is the *regulation* exerted by section 10 of the act and its field is bounded on the state side by the period of the importer's custody. The right to follow it farther for purposes of seizure and confiscation (which appellee would have read into the act) would not be *regulation*. It is the mere right of apprehension of an inanimate criminal.

What technical reason can be urged why the right of state regulation of this same outlaw whose status has thus been established should not exist while it is in the channels of the internal commerce of the state, assuming, of course, that the character of the state regulations is not such as to defeat the right of pursuit which we are for argument's sake conceding to exist in the federal authorities?

When an article of food or drugs enters the state through the channels of interstate commerce, it either does or does not offend against the provisions of section 10 of the federal act, according as it is or is not adulterated or misbranded. If the article has not offended against the federal act, federal authorities have no interest in it and there exists no reason why the state statutes should not operate upon it. If it has offended

against the federal act, but not against the state statutes, the latter will not interfere with it, or prevent its confiscation (under the assumption upon which we are now proceeding) by the federal authorities. If it has offended against both systems and is first seized and destroyed by the state, the end sought to be attained by both systems—the protection of the consumer by the destruction of the product—has been accomplished, and it is a matter of indifference which agency accomplished the result. The fact that the state statute, by operating first, prevented the accomplishment of the same end sought by the federal act cannot be said to constitute *interference* with the latter act or *conflict* between the two systems. Such a situation would not be open to the criticism made of the state statute in the *McDermott* case, because there the state statute operated in such a way as to permit the product still to pursue its course to the consumer, after compliance with the state statute, instead of accomplishing its destruction.

However, our entire argument here advanced rests upon an impossible assumption, and is advanced only in deference to appellee's attempted extension of the doctrine of outlaw or contraband articles under the Food and Drugs Act. No such extension of that doctrine is warranted either by the act or the decisions interpreting it.

2. *Section 10 of the Food and Drugs Act does not authorize the seizure of contraband articles of food or drugs after they have left the possession of the importer.*

Pages 63 and 64 of appellee's brief show an apparent failure to realize that the limits of the right of seizure of contraband articles of food or drugs under section 10

of the federal act are set, not by the "original package" or "first sale" doctrines of the courts, but by the language of the act itself. When congress, as we contend, wrote the "original package" doctrine into section 10 of the act it ceased to be a court made doctrine, restricted as such, and became part and parcel of the act itself—a limitation, not imposed from without, but self-imposed by congress upon federal jurisdiction under the act. The power of congress thus to limit itself (assuming, without conceding, that it might have followed the product farther) cannot be denied.

Clark Distilling Co. v. Western Maryland Railway Co., 242 U. S. 311, 323, *et seq.*

The question therefore resolves itself into the problem (already considered) of the construction of section 10 itself. For the language of that section, without extensions or additions, determines the limits within which the outlaw product may be pursued and seized. Both the text of the section and the very decisions which appellee cites construing it negative appellee's contention and affirm a construction so limiting the right of seizure that it terminates with the custody of the importer. This point has been fully covered by our main brief.

The case of *Hipolite Egg Co. v. United States*, 220 U. S. 45, 57, 58, does not support appellee's construction of section 10 of the act. In this case, the product which had been shipped in interstate commerce was still in the hands of the importer at the point of destination in the original unbroken packages of shipment. But it had there been kept by him for a number of months mingled with a mass of similar goods in a warehouse. The court in the course of discussion of the fact

that the product, being adulterated under the act, was subject to seizure, said (p. 57) :

“It is clearly the purpose of the statute that they (the goods) shall not be stealthily taken out (of interstate commerce) again upon arriving at their destination and be given asylum in the mass of property of the state. Certainly not, *when they are yet in the condition in which they were transported to the state*, or, to use the words of the statute, *while they remain ‘in original unbroken packages.’* In that condition they carry their own identification as contraband of law. Whether they might be pursued beyond the original package we are not called upon to say.”

And again at page 58:

“Appropriate means to that end (this is, denying to such outlaws the facilities of interstate commerce) which we have seen is legitimate, are the seizure and condemnation of the articles *at the point of destination in the original unbroken packages.*”

Both of these quotations show that the *Hipolite* case, so far as it determines the matter at all, defines the power of seizure as coextensive with the period of possession of the product *at its destination, by the importer, in the original, unbroken packages.*

Nor does the *McDermott* case offer better support to appellee's contention. As we have already seen in the prior consideration of this decision (page 17, *supra*), it does not construe the federal act as warranting the pursuit of the adulterated or misbranded article beyond “the shelf of the importer,” or its seizure except while the article remains in the hands of the importer, “unsold, whether in original packages or not.”

And in that case this Court made it perfectly plain that it was not intended by the interpretation of the act

there announced to deny the right of the state to enact and enforce its own regulations, operative upon the same product after it entered the field of the state's internal trade.

“While these regulations are within the power of Congress, it by no means follows that the State is not permitted to make regulations, with a view to the protection of its people against impure food or drugs. This subject was fully considered by this court in *Savage v. Jones*, 225 U. S. 501, in which the power of the State to make regulations *concerning the same subject matter*, reasonable in their terms and not in conflict with the acts of Congress, was recognized and stated.” (*McDermott* case, p. 131.)

III

The sale of appellee's product by a hotel or restaurant keeper to his guest is subject to state regulation in the same manner as the sale at retail of any other article of food within the state.

The argument is advanced at pages 82-89 of appellee's brief that a restaurant keeper has the right to furnish to his patrons at his table appellee's food products, purchased for that purpose, without right of regulation by the state under the challenged statutes.

There are two answers to this claim and the arguments adduced in its support:

(1) It is based upon the erroneous assumption that the control of the Food and Drugs Act follows the product after the original package is broken; that the immediate container is also an original package; and that this federal control is asserted under the act down to the time when the immediate container is purchased by the restaurant keeper, and hence state regulation of the products up to that point is excluded. This, as has been shown in our main brief and elsewhere in this brief, is an unfounded assumption.

(2) Assuming, however, merely for argument's sake, that the premise stated in the immediately preceding paragraph is sound, the conclusion drawn by counsel is not warranted thereby.

The rule of law which appellee seeks to apply through alleged analogy, as shown by the two cases cited in its support (*Rosenberger v. Pacific Express Co.*, 241 U. S. 48; *F. A. Patrick & Co. v. Deschamp*, 145 Wis. 224), is

that the payment of the price for goods shipped from one state to another in interstate commerce is part of such commerce, and as such beyond the power of the state to regulate or prohibit. As was said in the latter case in the quotation from it selected by appellee:

“It seems that it can hardly be doubted but that the taking of security by mortgage for the payment of an interstate commerce debt is necessarily included within the term ‘interstate commerce.’ *The interstate transaction cannot be said to be closed until the purchase price is paid.*” (*Patrick & Co. v. Deschamp, supra*, p. 228.)

Applying this language to the instance of catsup furnished by a restaurant keeper to his guest, could it be said that the interstate transaction as regards that particular unit of appellee's product had not been completed until the catsup had been so furnished and consumed! The mere statement would seem to constitute a complete *reductio ad absurdum*. There is no more analogy in principle than in facts between the cases cited and the instant situation.

Appellee also invokes the assumed analogy of consumption of a food product by the purchaser or his family. One of the plain distinguishing features, differentiating the instant situation from such illustration is that in the case of the hotelkeeper there is *a sale of the product at retail*. The guest who pays for accommodations at the hotel is purchasing at retail the various food products which he consumes. The situation is not otherwise in principle than if he went to a retail grocer and purchased for consumption an equal amount of the various foods. Being simply a purchase at retail, the attempted analogy utterly fails.

Therefore, even if it were conceded that federal con-

trol followed appellee's product into the possession of the restaurant keeper and up to that point was exclusive of state regulation, it would by no means follow that such restaurant keeper could open the individual containers, sell therefrom to guests at retail, and still plead exemption from local control.

There is far less reason for urging in this case that the resale by the hotel keeper should be immune as regards local regulation than there was for claiming immunity from state regulation in the cases of *Mutual Film Corporation v. Ohio Industrial Commission*, 236 U. S. 230, *Mutual Film Corporation v. Kansas*, 236 U. S. 248, *Mutual Film Corporation v. Industrial Commission of Ohio*, 215 Fed. 138, 146.

There an attempt was made to extend the protection of interstate commerce over films which had been taken out of the boxes in which they were shipped into the state and which were ready to be exhibited to audiences. The Court refused thus to extend the federal control.

• • • •

In submitting this case upon the argument advanced in our main brief and here, we desire to emphasize the importance to the several states of the principles involved. The appellee's construction of the Food and Drugs Act means that congress has occupied practically the entire field of regulation, both as to adulteration and misbranding of food and drugs, to the exclusion of the several states therefrom; and that it has done so not only within the limits ordinarily assigned to "commerce among the several states," but within new limits inclusive of the entire course of the product from the manufacturer in one state to the consumer in the other.

As Judge Sanborn in supporting and applying this conclusion stated, it necessarily excludes all right of state regulation as to purity and branding of products entering the state through the channels of interstate commerce. (*Corn Products Company v. Weigle*, 221 Fed. 988, 996.) This is not a consummation to be desired, from the standpoint of public welfare. The regulation of food and drugs is peculiarly an exercise of the police power. That power, inherent in the states, is not to be lightly superseded as regards intrastate commerce, particularly by an extension of federal control under the commerce clause beyond all recognized constitutional bounds, inherent in the clause itself. As has been well said in answer to a similar contention raised in a similar case,

“The grant of the constitution to congress does not and cannot reach so far as to prohibit the states from the protection of their citizens against fraud in the sale of property, over which they alone have jurisdiction, to their own people.”

Ex parte Agnew, 131 N. W. (Neb.) 817, 819.

The construction for which we contend does not result in the emasculation of either the state or the federal pure food code. Each is operative within its own sphere as defined in the federal act. Each supplements the other. Together they afford complete and adequate protection to the consumer.

It is the duty of the court, when called upon to construe federal legislation operative upon subjects as to which the states have also legislated, to search for a basis upon which the two enactments can be harmonized and left to operate together. An intent on the part of congress to supersede the police power of the state is not to be implied; it is not to be determined that this

result has been accomplished unless there is actual conflict between the state and federal enactments. Both state and federal courts have applied this principle to analogous situations.

Savage v. Jones, 225 U. S. 501;

Arrigo v. Hyers, 152 N. W. (Neb.) 319.

Under the construction of the Food and Drugs Act for which we contend, the construction according to which it has been successfully administered for twelve years, no conflict between it and the challenged statutes has arisen in the past or can arise in the future. We respectfully urge that this construction be applied in this case, the decree appealed from reversed and the bill of complaint dismissed for want of equity.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1912, No. 1123

GEORGE J. WEIGLE

Appellant

CURTICE BROTHERS CO.

Appellee

APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN
DISTRICT OF WISCONSIN

BRIEF AND ARGUMENT FOR APPELLANT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1915, No. 138

GEORGE J. WEIGLE

Appellant

CURTIS BROTHERS CO.

Appellee

APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN
DISTRICT OF WISCONSIN

BRIEF AND ARGUMENT FOR APPELLANT

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UNITED STATES OF AMERICA

In Supreme Court

GEORGE J. WEIGLE,

Appellant.

vs.

CURTICE BROTHERS CO.

Appellee.

**Appeal from the District Court of the United
States for the Western District
of Wisconsin.**

BRIEF AND ARGUMENT FOR APPELLEE.

STATEMENT.

This is an appeal by George J. Weigle, defendant, from a decree of the District Court for the Western District of Wisconsin entered in favor of Curtice Brothers Co., plaintiff—Hon. A. L. Sanborn, District Judge presiding—enjoining the defendant, who is the Dairy and Food Commissioner of that State, his agents, inspectors and employees, and all district attorneys of the State, from enforcing certain food statutes of Wisconsin, as applied to the food products of the plaintiff—all of which are interstate products (Transcript 5)—because invalid, under the Food & Drugs Act of Congress of June 30, 1906 (34 Stats. 768) and the Commerce Clause of the Federal Constitution. One of the state statutes prohibited, with a penalty,

the sale, or the having in possession with intent to sell, of food products containing benzoate of soda, and others of such statutes vested in the state courts power to determine all questions of adulteration of such products—adulteration being defined as in the Food & Drugs Act of Congress (Transcript 5-6 and this brief, margin pp. ~~6-9~~11).

The defendant, having demurred to the bill of complaint for want of equity, and the demurrer having been overruled with leave to answer, declined to further answer; and decree went against defendant, upon the admission of the truth of the facts alleged in the bill, except that the decree recognized the defendant's disavowal in open court (Transcript 18) as withdrawing from the case all sales and possession for that purpose, in the outer wooden box, by importers into the state—the validity of which sales and possession was admitted by the defendant.

The bill of complaint alleges, and the decree finds as true, among others, the following facts: The plaintiff is and for many years has been a manufacturer at Rochester, New York, of various food products and condiments, including catsup, jellies, jams, preserves, mince meat, chili sauce and pickled peaches and pears. These articles are put up at the factory in bottles and jars, as immediate containers, for sale to consumers, and are packed for shipment, in interstate commerce, in wooden boxes containing a number of such immediate containers (Transcript 2). All sales in Wisconsin, whether at wholesale or retail, are of packages shipped into the state to jobbers or retailers directly from the factory at Rochester or from jobbers in Chicago, Illinois, or bought by retailers from Wisconsin jobbers who purchased either from the manufacturer or other jobbers in Wisconsin

or outside the State (Transcript 2). Retailers sell to consumers and to restaurant and hotel keepers, in the immediate containers, for family consumption, or consumption by patrons at the tables or counters of restaurant or hotel keepers (Transcript 2).

The plaintiff for many years had sold its food products in large quantities in Wisconsin to jobbers and retailers, and to jobbers outside the state who sold to dealers in that state, until the passage of Chapter 399, Wisconsin Laws 1909 (Transcript 5, margin of this brief p. 8), when for a time it discontinued its sales, which were resumed during the summer and fall of 1915 and continued until the defendant, his agents, inspectors and employees, by their threats, interferences and unlawful course of conduct caused irreparable injury to the plaintiff's sales and business in Wisconsin by, among other things, threatening prosecution of all dealers selling at wholesale or retail, either in the outer box or the immediate container, plaintiff's products and threatening restaurant keepers who were serving to their patrons at their tables and counters, in open bottles and jars, plaintiff's products, shipped into the state and sold as stated, all as claimed by the defendant and his aids in violation of the state statutes (Transcript 5-6, 7-8).

The bill alleges, and the decree finds as a fact (Transcript 2-3) that as far back as 1902 the plaintiff—hereafter called appellee—found it necessary, in order to preserve the purity and distinctive flavors of its finished products, and of the fruits and materials out of which they were to be manufactured, while in course of manufacture, to use a small quantity of benzoate of soda. This was done originally, and has ever since been continued, upon the advice of eminent scientists—in every way fitted to have and express

an opinion on the subject—that benzoate of soda in food is not poisonous or deleterious or injurious to health; and, upon the faith of the investigations and determination by the Secretary of Agriculture to the same effect, by authority of Act of Congress approved June 30, 1906, as Public Act No. 382, as set forth in Food Inspection Decision 104 of the Department of Agriculture, issued March 3, 1909 (Transcript 3-4; margin of this brief pp. 17, 18-19) and also Regulation 15 of the three Secretaries made under authority of section 3 of the Food & Drugs Act of Congress (Transcript 4; margin of this brief pp. 22, 23-24).

Other facts are stated in the bill of complaint which will appear in the course of the argument in this brief where the points involving them are discussed.

It is conceded by defendant—hereafter called appellant—that the bill makes a case for the relief granted, provided the state statutes are invalid in the respects named in the decree.

We will present the case under five propositions, the second and third of which will be considered together, as follows:

ISSUES INVOLVED.

I. So long as the appellee's food products retain their interstate character, the state statutes are invalid as applied to them, because those statutes cover a part of the field the subject of regulation by the Food & Drugs Act of Congress of June 30, 1906, (34 Stats. 768):

II. In order that the purpose of the Food & Drugs Act be made effective to protect the consumer against adulteration, the immediate container of the food product is made by the latter Act a package of interstate

commerce, the adulteration of the contents of which is penalized by that Act:

III. All Wisconsin sales of appellee's food products, either in the immediate container or the outside wrapping or box, unbroken, are interstate transactions, within the provisions of Section 10, if not Section 2, of the Food & Drugs Act, notwithstanding the doctrine of the courts, *in the absence of such a regulation by Congress*, restricting sales in interstate commerce to a single sale by the importer in the unbroken outer wrapping or package.

IV. The original package and single sale rule of the courts was made in the absence of any regulation by Congress on the subject, and to protect the importer in his right to sell a lawful importation. It has no application to illicit or outlawed articles, such as adulterated foods, which are denied by Congress the facilities of interstate commerce. Hence the words "original unbroken packages" found in Secs. 2 and 10 and "unbroken packages" in Sec. 3 of the Food & Drugs Act, must receive, and have, by this court been given, a construction which will apply them to both the wholesale and retail packages, that is, the outer box or wrapping and the immediate container.

V. The serving, in the open bottle or jar, to his patrons by a restaurant keeper, for consumption at his table or counters, of appellee's food products which he has purchased, in such immediate container unbroken, from a Wisconsin retailer for such consumption, is a lawful act of interstate commerce, and may not be prohibited by the State.

POINTS AND AUTHORITIES.

I.

So long as the appellee's food products retain their interstate character, the state statutes are invalid as applied to them, because those statutes cover a part of the field the subject of regulation by the Food & Drugs Act.

FIRST. Since it was admitted in the court below, and is admitted here, that sections 4600, 4601, 4601e and 4601f of the state statutes, as applied to appellee's food products, are invalid in case it be determined that Section 4601g (See margin*) is invalid, it will be necessary to consider the validity of Sec. 4601g only. *Each section of the state statutes recognizes a conclusive power of determination of the fact of adulteration, in another and different tribunal than the Federal courts in which such power is vested by the Food & Drugs Act of Congress.* All food products here involved are brought into Wisconsin from other States, and under the Federal Act, retain their interstate character, as to the question of misbranding or adulteration, so long as they remain in original unbroken packages.

* Sections 4600, 4601, 4601e, 4601f and 4601g are embodied in Chapter 187 of the Wisconsin Statutes under the title "Offenses against the Public Health." They read as follows:

Sec. 4600. Any person who shall, by himself, his servant or agent, or as the servant or agent of any other person, sell, exchange, deliver or have in his possession, with intent to sell, exchange, offer for sale or exchange . . . any article of food which is

Second. To whatever extent the State may regulate interstate commerce, in the absence of regulation in the same aspect by Congress, there is no disputing the proposition that Congress having enacted a regulation covering a particular field of the subject, all power of the State, directly or indirectly, to legislate in the same field is superseded and the Federal regulation is supreme and exclusive.

Northern Pacific Ry. Co. vs Washington, 222 U. S. 370.

Southern Railway Co. vs Reid, 222 U. S. 444.

Savage vs Jones, 225 U. S. 501, 529.

Adams Express Co. vs Croninger, 226 U. S. 491, 500, 505-6.

Erie R. R. Co. vs New York, 233, U. S. 671, 681.

adulterated . . shall be fined not less than Twenty-five dollars or more than One hundred dollars or be imprisoned in the county jail not less than thirty days nor more than four months . . . The term, "food" as used herein shall include all articles used for food, or drink, or condiment, by man, whether simple, mixed or compound, and all articles used or intended for use as ingredients in the composition thereof or in the preparation thereof.

Sec. 4601. An article shall be deemed to be adulterated within the meaning of the preceding section

(2) In the case of food:

Sixth. If it is mixed, colored, coated, polished, powdered or stained, whereby damage or inferiority is concealed

Seventh. If it contains any added substance or ingredient which is poisonous, injurious or deleterious to health, or any deleterious substance not a necessary ingredient in its manufacture.

Sec. 4601e. No person, firm or corporation shall by himself, or by his agents or servants

The rule of the cases is thus expressed:

"The relative supremacy of the State and National power over interstate commerce need not be commented upon. Where there is conflict the state legislation must give way. Indeed, when Congress acts in such a way as to manifest its purpose to exercise its constitutional authority the regulating power of the State ceases to exist."

Erie R. R. Co. vs New York, supra 681.

The court in a more recent case seems to have gone further, so as to eliminate any necessity of direct conflict between State and Federal regulation, where the same field is actually occupied by both—except as that fact itself raises a conflict. It is said in

sell, ship, consign, offer for sale, expose for sale, or have in his possession with intent to sell for use or consumption within the state, any article of food within the meaning of section 4600 of the statutes which contains . . . any . . . preservatives injurious to health

Sec. 4601f. Every person, firm or corporation, and every officer, agent, servant or employee of such person, firm or corporation, who violates any of the provisions of Sec. 4601e shall be fined not less than Twenty-five dollars nor more than One hundred dollars, or be imprisoned in the county jail not less than thirty days nor more than sixty days.

Sec. 4601g. It shall be unlawful to sell, offer or expose for sale, or have in possession with intent to sell, for use or consumption in this State, any article of food, as defined in Section 4600 of the statutes, which contains added . . . benzoates; provided, that when in the preparation of food products for shipment they are preserved by any external application of . . . benzoates, in such a manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on

Southern Ry. Co. vs R. R. Comm. Ind. 236
U. S. 439, 448,

"The test, however, is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the State had any jurisdiction of a subject over which Congress had exerted its exclusive control." (Italics ours)

In the still later case of *Charleston & Car. R. R. Co. vs Varnville Co.* 237 U. S. 597, 604, this court said:

"When Congress has taken the particular subject-matter in hand, coincidence is an ineffective as opposition, and a State law is not to be declared a help because it attempts to go further than Congress has seen fit to go." (Italics ours)

Third. Section 4601g occupies a part of the field of regulation of interstate commerce covered by the Food & Drugs Act, and is therefore invalid as applied to appellee's food products.

(1) Section 4601g was originally enacted as Chapter 399 of the Laws of Wisconsin for 1909, to take effect January 1, 1910, and is entitled "An Act to create Section 4601g of the statutes, to protect and promote

the covering or the package, the provisions of this section shall be construed as applying only when said products are ready for consumption:

Penalty.—Any person who, by himself, his servant or agent, or as the servant or agent of any other person, or as the servant or agent of one firm or corporation, shall violate any of the provisions of this section shall, upon conviction thereof, be punished by fine of not less than Twenty-five dollars nor more than One hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than sixty days.

the public health, to prevent fraud and deception in the sale of articles of food and provide a penalty."
(Italics ours)

The only "fraud or deception" which defendant suggests the statute was intended to prevent is the possible concealing of damage or inferiority in a food product by the use of a benzoate as a preservative. We are unable to conceive of any other purpose that could be embraced in that phase of the title of the act. While denying that the use of benzoate of soda as a preservative in appellee's foods conceals damage or inferiority, or that any damage or inferiority exists to be concealed, appellee admits the purpose of the State statute to be, as the appellant suggests, that is (a) the protection of the public health and (b) the prevention of fraud or deception by the concealing of damage or inferiority, but insists that so construed the State statute, if valid, *conclusively determines* that benzoate of soda in food is not only a deleterious ingredient injurious to the health of the consumer, but perpetrates a fraud or deception upon the consumer by concealing, in every instance, damage or inferiority in the food he purchases for consumption. These are the very facts which are submitted to the exclusive determination of the Federal courts by the Food & Drugs Act of Congress.

ADULTERATION AS DEFINED BY THE FEDERAL ACT.

(2) In the case of food, adulteration is defined in section 7 of the Federal Act to result

(a) "If it be mixed . . . in a manner whereby damage or inferiority is concealed";
and

(b) "If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health." (See margin*)

Whether benzoate of soda, as an added ingredient, is an adulteration, for either of the reasons named in the Federal Act, is, by that Act, submitted to the Federal courts for their determination, as a fact, upon proofs to be presented to court or jury. A proceeding *in rem* against the article itself, if adulterated as defined in Sec. 7, is provided for by Section 10 of the Act (See margin**).

*** Portions of Food & Drugs Act of Congress.**

Sec. 7. That for the purposes of this Act an article shall be deemed to be adulterated;

In the case of food:

Fourth. If it be mixed, colored, powdered, coated or stained in a manner whereby damage or inferiority is concealed.

Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health; Provided, That when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this Act shall be construed as applying only when said products are ready for consumption.

** Section 10. That any article of food . . . that is adulterated or misbranded within the meaning of this Act, and is being transported from one State . . . to another for sale, or having been transported, remains unloaded, unsold or in original unbroken packages . . . shall be liable to be proceeded against in any district court of the United States with-

(3) Every article of food which contains an added ingredient that is injurious to health, or is mixed in a manner to conceal damage or inferiority, is excluded from interstate commerce by Sec. 2 of the Federal Act, as an *adulteration*, and if it be found there, is treated by Sec. 10 as a contraband of commerce, to be seized, confiscated and destroyed or sold as the Federal court shall order.

(4) The Federal courts are constantly exercising the jurisdiction, conferred by the Food & Drugs Act, against food products adulterated because containing an added ingredient deleterious to health, or whereby damage or inferiority is concealed. The following are some of the cases:

Hipolite Egg Co vs United States, 220 U. S. 45.

United States vs 950 Boxes of Macaroni (D. C.)
181 Fed. 427.

French Silver Dragee Co. vs United States, C.
C. A.) 179 Fed. 824.

United States vs Lexington Mills & Elevator Co. 232 U. S. 399.

United States vs Coca Cola Co. 241 U. S. 265.

Thus there is left no doubt that the state statute undertakes to decide, *adversely to appellee's food pro-*

in the district where the same is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this Act, the same shall be disposed of by destruction or sale, as the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States, but such goods shall not be sold in any jurisdiction contrary to the provisions of this Act or of the laws of that jurisdiction."

ducts, a question of fact, the decision of which has been committed by Congress to the Federal courts exclusively—and which were it submitted to such courts might, as a matter of fact, and, as appellee contends, *must, as a matter of law*, be determined in its favor.

The appellant does not seem to controvert this proposition, but passes it by without discussion or even reference and therefore presumably concedes its correctness. He contents himself with the claim that all sales of appellee's products, except those made by the importer in the outer box, are not interstate transactions, but sales in the internal commerce of the State—which, of course, we deny.

Fourth. Whether the fact of adulteration would or would not be decided in appellee's favor, should it be submitted to a Federal Court, is not determinative here, since the invalidity of the State statute results from the fact that it covers a part of the field of the Federal Act, in that the latter Act confers on the Federal courts the power to determine the very fact which the State legislature has undertaken to conclusively decide.

The language of this court in *McDermott vs Wisconsin*, 228 U. S. 115, 132, is especially pertinent here, although it relates to a charge of misbranding instead of adulteration:

“It is enough for the present purpose to say that so far as this record discloses, it was undertaken in good faith to label the articles in compliance with the Act of Congress, and if they were not so labeled, by § 2 provision is made for the enforcement of the Act by criminal prosecution and by § 10 by proceedings *in rem*. *Whether the label complied with the Federal law was not for*

the State to determine. This was a matter provided for by the Act of Congress and to be determined as therein indicated by proper proceedings in the Federal courts." (Italics ours)

So here, the bill of complaint alleges—and it is admitted by the demurrer and found as a fact by the lower court—that the appellee in good faith uses in its food products benzoate of soda as a *necessary* preservative (not merely a "desirable" preservative as counsel state) of their purity and natural flavor, upon the advice of scientists, *in every way qualified to speak on the subject*, that such use is harmless (Trans. 2-3, R. 5). *But if it were not so*, sections 2 and 10 of the Federal Act make adequate provision for proceedings *in personam* and also *in rem* for the vindication of that Act. Paraphrasing a part of the above quotation from the McDermott case to meet the facts of this: "Whether a food containing benzoate of soda as a preservative is deleterious to health or is mixed in a manner to conceal damage or inferiority, *was not for the State to determine.* This was a matter provided for by the Act of Congress to be determined as therein indicated by proper proceedings in the Federal courts."

So if any sales of appellee's products made in the immediate containers, or by other dealers than the importer, are interstate transactions—and we contend that all are such—it must be beyond controversy that, as to such sales, the state statutes cover a field which is within the provisions of the Food & Drugs Act of Congress, and therefore invalid.

II.

But the Secretary of Agriculture, under authority of Act of Congress of June 30, 1906, Public Act No. 382 (Ch. 3912, 34 Stats.

1271) determined that benzoate of soda, as a preservative in food, is not harmful to health. This determination is conclusive of the fact that the appellee's food products are lawful subjects of interstate commerce, at least so far as being deleterious to health is concerned. (Trans. 3-4, Record 6-8).

FIRST. The State may not declare contraband, in interstate commerce, an article of food recognized by Congress as a lawful subject of such commerce, as is the case with appellee's products. We are not here speaking of the internal commerce of the state but of interstate commerce alone; always insisting however, that all sales of appellee's products in either the wholesale or retail package, by whomsoever made, in the ordinary course of trade, are interstate transactions, within the regulations of Sec. 10 of the Food & Drugs Act, so far as concerns the fact whether the product is or is not adulterated.

Leisy vs Hardin, 135 U. S. 100, 125.

Lottery Case, 188 U. S. 321, 361.

Kirmeyer vs Kansas, 236 U. S. 568, 572.

As was said by this court in *Leisy vs Hardin*, supra.

"Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we can not hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized, *can be controlled by state laws amounting to regulations.* To concede to the State the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a State, represented in the legislature, the power to regulate commercial intercourse between the States, by determining what shall be

its subjects, when that power was distinctly granted to be exercised by the people of the United States represented in Congress, and its possession by the latter was considered essential to that more perfect Union which the Constitution was adopted to create." (Italics ours)

The State statute in effect declares a food containing benzoate of soda deleterious, or injurious to health, while the Secretary of Agriculture, acting under authority of Congress, has determined to the contrary. The State statute prohibits, with a penalty, the sale of interstate commerce of a food product which has thus been declared by Congress to be a lawful subject of interstate commerce. This alone would render the State statute invalid, as applied to appellee's food products, provided, as to the fact of adulteration, such products are within the provisions of Sec. 10 of the Federal Act, as we contend they are.

Second. The determination, by the Secretary of Agriculture, under Public Act No. 382, (34 Stats. 1271) having been by authority of a law of Congress is a rule of evidence under the Food & Drugs Act.

(1) Public Act No. 382 was an appropriation act for the Department of Agriculture. It made a specific appropriation as the Act declares

"...to enable the Secretary of Agriculture to investigate the character of *food preservatives, coloring matters, and other substances added to foods, to determine their relation to digestion and to health, and to establish the principles which should guide their use and to publish the results of such investigation when thought advisable.*" (Italics ours)

The language, in which this power is granted to the

Secretary of Agriculture, seems to have been used by Congress with special reference to the clause of the Food & Drugs Act already quoted, which declares an article of food to *adulterated* "If it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health." In other words the Secretary was empowered to inquire into the character of benzoate of soda, as well as all other food preservatives, and to determine its relation to digestion and to health—that is whether, as an added ingredient in food, it is poisonous or deleterious or injurious to health; "and to *establish* the principles which should guide (its) use"; or, in other words, to establish rules designating the conditions or circumstances under which benzoate of soda or any other food preservative may or may not be used in food.

FOOD INSPECTION DECISION 104.

The Secretary of Agriculture, with the aid of learned scientists, made this investigation and published its results. They are set forth in Food Inspection Decision 104, which, from March 3, 1909, until the present, has remained in full force. This determination, omitting the statement of the investigations on which it is based, is set forth in the margin.*

Public Act 382 and the Food & Drugs Act were

***Food Inspection Decision 104.**

United States Department of Agriculture
Office of the Secretary,
Board of Food and Drugs Inspection.
Food Inspection Decision 104
Amendment to Food Inspection Decisions No. 76

pending before Congress at the same time in separate bills, and were approved on the same day. Congress, of course, knew these bills, were being considered at the same time, and were *in pari materia*. Congress expected the Secretary of Agriculture to make the investigation authorized, and to determine the relation to digestion and health of benzoate of soda as a preservative in food—the use of which as such, Congress is presumed to have known—and to establish the principles which should guide their use—as we insist, “which should guide their use” *under all circumstances*.

(2) This determination would be futile were it to be regarded otherwise than as a rule of evidence, to be applied, whenever the question of the effect of the use of benzoate of soda in a food, arises under the Food & Drugs Act, or any other legislation of Congress—as for instance Chapter 3913, 34 Stats. 669, 672-675, which was also approved on the same day, June 30, 1906, by which the Bureau of Animal Industry was established, and it can not be assumed that Congress was doing a useless thing.

This Animal Industry Act required that the inspectors appointed under the act “shall . . . tag or label ‘Inspected and Passed’ all such (meat) products found to be sound, healthful and wholesome and which contain no dyes, chemicals, *preservatives* or

and No. 89, Relating to the use in foods of Benzoate of Soda.

The Referee Board of Consulting Scientific Experts, composed of Dr. Ira Remsen, Dr. Russell H. Chittenden, Dr. John H. Long, Dr. Alonzo E. Taylor and Dr. C. A. Herter, have reported upon the use of benzoate of soda in foods. The Board reports, as a result of three extensive and exhaustive investiga-

ingredients which render such meat wholesome or unfit for human food, and such inspectors shall label . . . or tag as 'Inspected and Condemned' all such products found unsound, unhealthful and unwholesome that shall contain dyes, chemicals, preservatives, or ingredients which render such meat or meat food products unsound, unhealthful, unwholesome or unfit for human food, and all such condemned meat food products shall be destroyed for food purposes as hereinbefore provided." (Italics ours)

To what use could the results of these careful and expensive investigations of the Secretary of Agriculture, under the provisions of Public Act No. 382, be put, other than as a rule of evidence, in the enforcement of such acts of Congress as the Food & Drugs Act, the Animal Industry Act and similar statutes? Such a use would not only give sensible purpose to the appropriation, and to the expensive scientific in-

tions, that benzoate of soda mixed with food is not deleterious or poisonous and is not injurious to health. The summary of the report of the Referee Board is published herewith.

It having been determined that benzoate of soda mixed with food is not deleterious or poisonous and is not injurious to health, no objection will be raised under the Food & Drugs Act to the use in food of benzoate of soda, provided that each container or package of such food is plainly labeled to show the presence and amount of benzoate of soda.

Food Inspection Decisions 76 and 89 are amended accordingly.

GEORGE B. CORTELYOU,
Secretary of the Treasury,

JAMES WILSON,
Secretary of Agriculture,

OSCAR S. STRAUS,
Secretary of Commerce and Labor.

vestigations intended to and actually made under the act, but would give *uniformity* to all rulings and decisions of the Departments and Courts, to which the determination made and the principles established by the Secretary of Agriculture might thereafter be applied.

San Antonio R. R. Co. vs Wagner, 241 U. S. 476, 484.

(3) The determination by the Secretary of Agriculture under authority of Public Act 382 is conclusive in all prosecutions or proceedings in rem under the Food & Drugs Act involving the finding.

Bates & Guild Co. vs Payne, 194 U. S. 106, 109-110.

Monongahela Bridge Co. vs United States, 216 U. S. 177, 192-193 and cases cited.

The Collector vs Richards, 23 Wall. 246, 257.

Coopersville Co-Operative C. Co. vs Lemon (C. A.) 163, Fed. 145, 150.

Buttfield vs Stranahan, 192, U. S. 474, 496.

Red "C" Oil Co. vs North Carolina, 222 U. S. 380.

Central Trust Co. vs Central Trust Co. 216 U. S. 251, 261.

This court in *Bates and Guild Co. vs Payne*, *supra*, 109-110, thus summarizes the decisions theretofore made on this subject:

"The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, *his decision thereon is conclusive*; and that even

upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power and will occasionally exercise the right of so doing." (Italics ours)

In *Central Trust Co. vs Central Trust Co.* supra 261, it is said:

"We have had occasion to consider the effect of findings of fact by officers in charge of the several departments of government, and the accepted rule is that those findings are conclusive, unless palpable error appears."

THIRD. Public Act No. 382 gives authority to the Secretary without limitation, to establish the principles which should guide the use of preservatives in foods. We assume that by "principles" is meant the rules needed for the protection of the public when preservatives are used. In establishing such rules, it must be assumed that the Secretary of Agriculture would consider all the uses to which preservatives might be put to the harm of the public, as an ingredient in foods, and conform the rules to the protection of the public against *all* harmful uses—not merely their effect upon the health of the consumer but the deception of the consumer, if any, by their use as a means of concealing damage or inferiority.

The fact that the Secretary of Agriculture joined with the Secretary of the Treasury and the Secretary of Commerce and Labor, in prescribing the rule contained in Regulation 15, to the effect that no objection would be made to the use of benzoate of soda under the Food & Drugs Act "provided that each container or package of such food is plainly labeled to show the presence and amount of benzoate

of soda" is proof conclusive that such regulation regarded by the Secretary of Agriculture as together adequate for the protection of consumers they required any protection. It is possible that Secretary's investigations convinced him that the question worthy of serious consideration under the Act No. 382 was the effect upon health or digestion of the use of benzoate of soda, and either that it was as a means of concealing damage or inferiority was consequential, *or that it could not be used with such effect.* However this may be he had the authority under this Act of Congress to establish the principles which should guide the use of benzoate of soda and did so; and his action must be regarded as having the same force as though it were written into the Food & Drugs Act itself. It may not be supplemented more, than it may be annulled by State legislation must be considered as the full measure of protection required by consumers.

Fourth. Regulation 15 made and promulgated by the three secretaries under Section 3 of the Food & Drugs Act is also conclusive of the fact that benzoate of soda is not injurious to health and is not a means of concealing damage or inferiority.

The Secretaries of the Treasury, of Commerce, Labor, and of Agriculture, are empowered by Section 3 to make rules and regulations for the carrying out of the provisions of the Food & Drugs Act. Regulation 15 is within the power granted (See margin

***Regulation 15.**

Wholesomeness of Colors and Preservation
(As amended to accord with F. I. D. 104. See

Cooperstown Co-Operative Creamery Co. vs Lemmon, supra.

St. Louis Ind. Packing Co. vs Houston (D. C.) 204 Fed. 120.

United States vs Ormsbee, 74 Fed. 207.

State vs Peet (Vt.) 68 Atl. Rep. 661.

United States vs Grimaud, 220 U. S. 506, 517.

United States vs Antikamnia Chem. Co. 231 U. S. 654, 667.

Penn. R. R. Co. vs Stineman Coal Co. 242 U. S. 298, 302.

Practically all that has been said relative to the conclusive character of the determination of the Secretary of Agriculture under Public Act 382 may be said of the effect of Regulation 15.

In *United States vs Grimaud*, supra, this court said:

"From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Con-

F. I. D. 76, 89, 92, 101, 102, 135 and 138 for rulings under this head)

(Section 7, Paragraph 5, under "Foods")

(a) Respecting the wholesomeness of colors, preservatives, and other substances which are added to foods, the Secretary of Agriculture shall determine from chemical or other examination, under the author-

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gress, or by penalties fixed by Congress or measured by the injury done." (Italics ours)

"Filling up the details" is shown to be nothing more than defining the cases which come within the general rule or standard fixed by the law that is to be carried into effect. A primary standard is fixed by the law, or general provisions are made, and the naming of such cases as come within that standard or generality of definition, is within the scope of such rules and regulations. Perhaps no better illustration of the office of such rules and regulations can be found than *Copersville Co-Operative Creamery Co. vs Lemon*, supra.

That was a case where an Act of Congress provided that

"any butter in the manufacture or manipula-

ity of the agricultural appropriation Act, Public 382, approved June 30, 1906, the names of those substances which are permitted or inhibited in food products; and such findings, when approved by the Secretary of the Treasury and the Secretary of Commerce and Labor, shall become a part of these regulations.

(b) The Secretary of Agriculture shall determine from time to time, in accordance with the authority conferred by the agricultural appropriation act, Public 382, approved June 30, 1906, the principles which shall guide the use of colors, preservatives and other substances added to foods; and when concurred in by the Secretary of the Treasury and the Secretary of Commerce and Labor, the principles so established shall become a part of these regulations.

(c) It having been determined that benzoate of soda mixed with food is not deleterious or poisonous and is not injurious to health, no objection will be raised under the Food & Drugs Act to the use in food of benzoate of soda, provided that each container or package of such food is plainly labeled to show the presence and amount of benzoate of soda, Food Inspection Decisions 76 and 89 are amended accordingly."

tion of which any process or material is used with intent or effect of causing the 'absorption of *abnormal* quantities of water, milk or cream' shall be deemed adulterated butter."

The act conferred on the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, power "to make all needful regulations for carrying the act into effect." Acting under this power the Commissioner made a rule that butter containing 16 per cent or more of water, milk or cream, *shall be classified as adulterated butter.*" That is the Commissioner determined that 16 per cent or more of water, milk or cream was more than a normal quantity of such ingredients in butter. The court, in the opinion by the late Mr. Justice Lurton, then a circuit judge, sustained the regulation, and in part said p. 147:

"That the delegation of authority to add to or to take from a law would be to delegate legislative power must also be conceded. But that Congress may enact a law *and delegate the power of finding some fact or state of things upon which the operation of the law is made to depend is equally clear.* (Citations) *The authority to make all needed regulations not inconsistent with law is not a delegation of power to add something to an incomplete law, nor a grant of judicial power. It is only an authority to determine the fact upon which the operation of the law is made to depend.* Congress might have made the necessary tests and might have acquired the knowledge of the butter-making art to enable it to have enacted that adulterated butter should consist of butter having a moisture content of 16 per cent or more. But that would have been an unnecessary detail, for it was altogether competent to declare that butter which contained an abnormal quantity of water, milk, or cream should be classified as adulterated butter, and that the fact as to what was, in dairy butter, an abnormal proportion of water, milk, or cream should be

determined by a regulation of the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury." (*Italics ours*)

Certainly if the Commissioner of Internal Revenue, under the power to make rules and regulations, might declare 16 per cent of moisture content an "abnormal" quantity, the three secretaries under a similar power, might determine the fact whether benzoate of soda is harmful to health or digestion, or may be used as a means of concealing damage or inferiority, although by so doing it might result that a food containing benzoate of soda as a preservative is not adulterated within the meaning of the Food & Drugs Act.

The court in the Coopersville case held that such a rule or regulation is conclusive of the fact. The other cases cited hold to the same doctrine as the Coopersville case.

As was said in

United States vs Antikamnia Chem. Co. supra,
p. 657:

"It certainly can not be said that the purpose of the law is not exactly fulfilled by the regulation. If it fulfills the purpose of the law it can not be said to be an addition to the law unless, indeed, it can be concluded that the law provided a means for its defeat by the easy device of mysterious names."

The power of the secretaries in the making of rules and regulations should not be hampered by arbitrary or technical restrictions, but be liberally construed to enable them to aid in the carrying out of the act to the fullest extent without adding to or taking from its provisions or *exercising purely judicial functions*. To what end could the three secretaries more appropriately devote their services and that of the scientists they might bring to their assistance, or who had been brought to the assistance of the Secretary of

Agriculture under Public Act No. 382, than in determining the physiological effect of particular preservatives, so that it might be known whether their use would not render food harmful to health. That is merely "filling in a detail" where the classification of the statute is general, and meets squarely the oft-repeated declaration of the court that such delegation of power is not only valid, but really essential to the orderly administration of many of the laws Congress is authorized to enact.

Thus it is seen the state statute not only covers part of the field of the Federal Act, but is in direct conflict with the determination of the Federal authorities, acting under the express authority of Congress, as to the nature and effect of benzoate of soda, as an added preservative in food. *In other words, the State statute declares that to be an outlaw of interstate commerce which Congress has declared to be a lawful subject of interstate commerce.*

III.

The support of the determination of the Secretary of Agriculture, under Public Act 382, or of the rule of the three secretaries made in Regulation 15, is not essential to the appellee's case, but merely reinforces it.

First. The exclusive jurisdiction of the Federal courts to determine, under the Federal act, what is or what is not a poisonous or deleterious added ingredient injurious to health, or an ingredient whereby damage or inferiority is concealed, and hence that it is not an adulteration within the meaning of that act, does not depend, as already said, upon the fact whether ben-

zoate of soda is or is not an added ingredient of the character stated but upon the power of the Federal courts, *to the exclusion of the state legislature*, to determine that fact, whatever a correct finding may be.

The appellee has, for many years, in good faith, as the bill of complaint alleges and as the lower court found (Trans. 2-3, 18, Record 4-5, 36) been engaged in preparing its food products with benzoate of soda as a preservative, and selling and shipping them in interstate commerce into Wisconsin and other States, and whether it or the dealers to whom it has sold its articles have, since the enactment of the Food & Drugs Act, been violating its provisions in making such use of benzoate of soda, is determinable alone by the Federal courts under the provisions of that act. But the Wisconsin state legislature by Sec. 4601g has undertaken to determine this precise question adversely to the appellee and its dealers, in utter disregard of the Federal act, and the jurisdiction conferred by it upon the Federal courts.

As said by this court in *McDermott vs Wisconsin*, as to a similar statute declaring how an interstate food article should be labeled p. 132:

“Whether the label complied with the Federal law (as here whether the plaintiff’s foods are injurious to health, or are so mixed as to conceal damage or inferiority, because containing benzoate of soda) was not for the State to determine. This was a matter provided for by the Act of Congress and to be determined as therein indicated by proper proceedings in the Federal courts.”

Corn Products Refining Co. vs Weigle (D. C.)
221 Fed. 988, 992-994.

United States vs Coca Cola Co. supra, 265.

The State statute is, therefore, invalid without ref-

erence to the action of the Secretary of Agriculture under Public Act. No. 382 or Regulation 15 of the three secretaries under the Food & Drugs Act, and certainly so when such action is taken into consideration.

Second. The fact, that in the absence of the Food & Drugs Act, or in case of failure of the party bringing suit to rely upon conflict with that act to invalidate state legislation, the police power would have operation, in no way impeaches our contention.

There is no doubting the scope of the police power over interstate commerce in the absence of legislation by Congress covering the subject. Nor is there any doubt that asserting the invalidity of a state statute, under the Fourteenth Amendment only, leaves unchallenged its validity under the Commerce Clause of the Constitution and the Food & Drugs Act enacted under that grant of power.

Curtice Brothers Co. vs Barnard, 209 Fed. 589 and *Price vs Illinois*, 238 U. S. 446, are cases of that character, where no claim of the invalidity of the state statute because of conflict with the Commerce Clause or the Food & Drugs Act was asserted, but solely because of conflict with the Fourteenth Amendment. Neither of these cases nor any similar cases cited by counsel touch the question here involved, where invalidity is claimed solely because of conflict with the Food & Drugs Act and the Commerce Clause of the Constitution.

IV.

The immediate container of appellee's food products is made a package of interstate com-

merce, the misbranding or adulteration of the contents of which is penalized by the Food & Drugs Act; hence all sales of such food products, either in the immediate container or in the outer wrapping or box, unbroken, are within the provisions of Section 10, if not Sec. 2, of that Act, notwithstanding the rule of the courts, in the absence of such a regulation by Congress, restricting sales in interstate commerce to a single sale by the importer in the unbroken outer wrapping or package.

The act must be construed in the light of its evident purpose—which is declared to be the protection of the consumer or purchaser of foods, in his health, and from fraud and imposition.

Whether we consider the question of adulteration from the standpoint of ingredients harmful to health, or of ingredients whereby damage or inferiority is concealed, the protection of the consumer is the sole purpose of the act.

McDermott vs Wisconsin, supra, 128.

United States vs Antikamnia Chem. Co. supra, 665.

United States vs Lexington Mill Co. 232 U. S. 399, 409.

United States vs Coca-Cola Co. supra, 276-277.

Second. The selection of appropriate and entirely adequate means to accomplish the purpose of a regulation of interstate commerce is with Congress alone.

(1) The scope of the power of Congress over legitimate subjects of interstate commerce has been

frequently declared by this court, from a very early date down to the present. Language peculiarly pertinent here was used

In re Rahrer, 140 U. S. 545, 562.

in reiteration of similar language used in *Brown vs Maryland*, 12 Wheat. 448,

"The power over interstate commerce is too vital to the integrity of the Nation to be qualified by any refinement of reason. The power to regulate is solely in the general government, *and it is an essential part of that regulation to prescribe the regular means for accomplishing the introduction and incorporation of articles into and with the mass of property in the country or state.* 12 Wheat. 488. No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so." (Italics ours)

This power of prescribing the means for accomplishing the introduction and incorporation of articles into and with the mass of property in the country or state rests under the Constitution primarily with Congress, and with the courts only when Congress fails to act on the subject. That is, the time when the police power of the state shall attach to an article of interstate commerce, as a part of the mass of property in the State, is for Congress to say, if it chooses to act on the subject. That is just what Congress has done in the Food & Drugs Act, with respect to illicit articles of trade.

In other words it is within the power of Congress to declare how long or at what point, in conveying an imported article of food from the manufacturer in one state to the consumer in another, its regulations shall

hold onto or shall let go of, even a legitimate subject of interstate commerce, after its introduction into such commerce—always defining that time or event by the necessities or convenience of the particular purpose to be served by Congress and the means adopted by it to effectuate such purpose.

Clark Distillery Co. vs Western Md. Ry. Co. 242 U. S. 311, 323-324.

(2) If Congress may be moved in the making of a commercial regulation, by such a purpose as conserving the health, or preventing deception of a consumer of food products moving in interstate commerce—as concededly it may be—the selection of appropriate and entirely adequate means to effectuate such purpose must necessarily be within the power of Congress. The power of regulation is complete in itself, permitting of no limitations other than those prescribed by the constitution, and none such are found to operate in this case.

Interstate Com. Com. vs Brimson, 154 U. S. 447, 473.

Lottery Case, 188 U. S. 321, 355.

Hoke vs United States, 227 U. S. 308, 323.

Seven Cases vs United States, 239 U. S. 510.

McDermott vs Wisconsin, *supra*.

Hipolite Egg Co. vs United States, *supra*.

It was said by this court in *Interstate Commerce Com. vs Brimson*, p. 473:

“Congress is not limited in its employment of means to those that are absolutely essential to the accomplishment of objects within the scope of the powers granted to it. It is a settled principle of constitutional law, that, ‘the government which has the right to do an act, and has imposed on it

the duty of performing that act, must, according to the dictates of reason, *be allowed to select the means*; and those who contend that it may not select *any appropriate means*, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception'. 4 Wheat. 316, 409. The test of the power of Congress is not the judgment of the court that particular means are not the best that could have been employed to effect the end contemplated by the legislature department. The judiciary can only inquire whether the means devised in the execution of a power granted are forbidden by the Constitution. It can not go beyond that inquiry without intruding upon the domain of another department of the government. That it may not do with safety to our institutions." (Italics ours)

This court in the *Lottery Case*, *supra*, as it has frequently since that case, used language more concretely applicable to the instant case than that already quoted.

"If lottery traffic, carried on through interstate commerce, is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic and simply regulate the manner in which it may be carried on? Or may not Congress *for the protection of the people of all the states* and under the power to regulate interstate commerce, devise *such means within the scope of the Constitution*, and not prohibited by it, as will drive that traffic out of commerce among the states? (Italics ours)

(3) The regulations of Congress may have all the qualities of police regulations.

This court said, in *Hoke vs United States*, 227 U. S. 308, 323, and repeated it in *Caminetti vs United States*, 242 U. S. 470, 492:

"The principle established by the cases is the simple one, when rid of confusing and distracting

considerations, that Congress has power over transportation 'among the several states'; that the power is complete in itself, and that Congress as an incident to it, may adopt not only means necessary but convenient to its exercise, *and the means may have the quality of police regulations.* Gloucester Ferry Co. vs Pennsylvania, 114 U. S. 196, 225; Cooley Constitutional Limitations, 7th Ed. 856." Italics ours)

Kelly vs Great Northern (C. C.) 152 Fed. 211, 228.

Lottery Case, supra, 354-355.

If such means may have the quality of police regulations, may they not have *all* the qualities of such regulations? Must they be any more restricted when prescribed by Congress than if the state itself were exercising the police power over the same subject? May not the exercise of the power of regulation by Congress, under the Constitution, be *as far reaching and minute in detail*, for the accomplishment of its intended purpose, when properly related to the subject, as a police regulation might be were the State enacting it? If the State may, for the purpose of preventing the adulteration of foods, regulate the sale to the consumer of the immediate container of an interstate article, in the absence of action by Congress on the subject, is there any reason why Congress may not do the same, since either regulation may have all the qualities of police regulations? It would certainly seem so.

If the State may lawfully penalize the possession of intoxicating liquors for personal use, as held by this court in

Crane vs Campbell, 245, U. S. 304,

the State may provide for the seizure of the outlawed article, for confiscation and destruction.

May not Congress under its conceded power to rid interstate commerce of debased food products likewise penalize their possession for personal use, and provide for their seizure and destruction? The reasoning of the court in *Crane vs Campbell* would seem to put this question beyond doubt, for it is said at p. 308;

“An assumed right of possession would necessarily imply some adequate method of obtaining not subject to destruction at the will of the State.”

If Congress may lawfully deny the right to sell an adulterated food, which has been introduced into interstate commerce, then it may deny the right of possession of such a contraband for use, and if it may deny such right of possession then it may seize and destroy in order to prevent its use. That is just what Congress has provided for in Sec. 10 of the Food & Drugs Act.

Third. Two packages are contemplated by the Food & Drugs Act—the immediate container and the outer wrapping or box.

The bill of complaint alleges, and the fact is conceded, as it is also a matter of common knowledge, that there are two packages involved in our inquiry—the immediate container of the interstate article—the bottle or jar—which carries the label and the food itself, and the outer wrapping or wooden box, in which the manufacturer for convenience encloses such bottles and jars for shipment in interstate commerce. The immediate containers, as the bill alleges and the court finds, and as is also a matter of common knowledge, are always taken out of the wooden box by the retailer, from whomsoever he may purchase—whether the manufacturer without the state or a jobber within or without the state—and separately sold to consumers. That is, the wooden box or outside wrap-

ping is broken up when it reaches the retailer's hands, the bottles and jars taken out, placed on the shelves of the retailer, and sold by him singly to consumers. *That was just the situation in the McDermott case.* McDermott was complained of that he "did unlawfully have in his possession with intent to sell and did offer and expose for sale, *and did sell*" an immediate container—a can—of the alleged misbranded compound. The immediate container which carries the food product is put up by the manufacturer and labeled for the specific purpose of being thus sold to the consumer. It is bought by the retailer with that particular purpose in view. The consumer does not buy a whole box of appellee's foods, which contains many bottles or jars, but he buys the food by the single bottle or jar, for use or consumption by himself and family, or, as in the case of a restaurant keeper, by his patrons at his tables and counters (Trans. p. 2; Record 4). Congress knew this method of trade when it enacted the Pure Food Law, and used its language in view of just such a course of interstate trade.

Fourth. It is the ruling of the district court—and both authority and reason seem to sustain the ruling—that these immediate containers are packages of interstate commerce, and are included among those designated as "original unbroken packages" by Sections 2 and 10, and as "unbroken packages" by Section 3 of the Food & Drugs Act.

(1) If the consumer is to be protected against misbranding, which defrauds him, then the package which bears the label—the immediate container which alone goes to him—must be, at least one of the pack-

ages, the truthful labeling of which and the purity of the contents of which are regulated by the Food & Drugs Act. It was so decided by this court in *McDermott vs Wisconsin*, supra. So if the consumer is to be protected against the purchase and use of adulterated food,—which is the purpose of the Federal Act—the immediate container, the contents of which go to the consumer for his use, must be at least one of the packages, the contents of which is regulated, as to adulteration by the Federal Act.

Rules of Statutory Construction.

“The presumption is,” as said by an authority on statutory construction, “that the lawmaker has a definite purpose in every enactment, *and has adapted and formulated the subsidiary provisions in harmony with that purpose*; that these are needful to accomplish it; and that, if they have the intended effect, they will at least conduce to effectuate it. *That purpose is an implied limitation on the sense of general terms, and a touchstone for the expansion of narrower terms. This intention affords a key to the sense and scope of minor provisions.* From this assumption proceeds the general rule that the cardinal purpose or intent of the whole act shall control, and that all the parts be interpreted as subsidiary and harmonious. *The purpose for which a law was enacted is a matter of prime importance in arriving at an agreed interpretation of its parts.*” (Italics ours)

2 *Lewis Sutherland Stat. Con.* (2 Ed.) Sec. 369 & cases in note.

Glaser, Kohn & Co. vs United States (C. C. A.)
224 Fed. 84.

Again, “the purpose of the law is the ever-insistent consideration in its interpretation.”

United States vs Antikamnia Co. supra 665.

In the same case this court, referring to the purpose of the Food & Drugs Act, said, pp. 667-668:

"This being the purpose, did the law leave it unexecuted? We can not attribute to it such defect, and a serious defect it might be. *Nor can we consider as a case of omission that which involves so definitely the mischief which was intended to be redressed and which is fairly within the language of the law.*" (Italics ours)

(2) The "original packages" of the Food & Drugs Act include both the wholesale and retail package, according to Regulation 2 of the three secretaries.

It is a very significant fact that, within four months after the enactment of the Food & Drugs Act, the three secretaries, acting under section 3 of the act, promulgated Regulation 2, which has remained in force unchanged ever since—more than 11 years—which declares the "original packages" of the act to include both the retail and wholesale package. The Regulation is found in the margin*

While the three secretaries possessed no power to change the meaning of the words "original unbroken packages" from that intended by Congress, yet they must have had first-hand sources of knowledge of the meaning intended by Congress, and their construction of the act, thus soon after its enactment, and their adherence to such construction so long and during all

* Regulation 2. Original Unbroken Package.

The term "original unbroken package" as used in this act is the original package, carton, case, can, box, barrel, bottle, phial, or other receptacle put up by the manufacturer, to which the label is attached, or which may be suitable for the attachment of a label, making one complete package of the food or drug article. The original package contemplated includes both the wholesale and the retail package.

changes in the personnel of the secretaryships, is very strongly indicative of the correct interpretation. It was necessary, in order that government inspectors, and other officials who were charged with carrying out the provisions of the act, might have a uniform rule, officially announced, so that the enforcement of the act should proceed with efficiency and harmony; and it became, therefore, a very proper thing for the three secretaries to determine, at the outset, in what sense Congress used the words "original packages."

A very plain intimation by this court that the Food & Drugs Act must receive this construction is contained in

Price vs Illinois, 238 U. S. 446, 455,
as follows:

"It should be added that no question is presented in the present case as to the *power* of Congress to make provision *with respect to the immediate containers (as well as the larger receptacle in which the latter are shipped)* of articles prepared in one state and transported to another, *so as suitably to enforce its regulations as to interstate trade..* *McDermott vs Wisconsin*, 228 U. S. 115, 135." (Italics ours)

In the *Price* case the question of a conflict between the state statute and the Food & Drugs Act was not asserted by the complainant and hence not involved, but this court to avoid any misconstruction of its decision made this pertinent statement.

(3) Food Inspection Decision 154 enforces a like construction of the act.

The three secretaries, even as late as May 11, 1914, persist in this same construction of the words "original packages."

39

On March 3, 1913, Congress passed an act known as the Gould Amendment to the Food & Drugs Act, which amended the "Third paragraph of Section 8, as to what constitutes a misbranding, so as it would read:

"Third. *If in package form*, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure or numerical count; Provided, however, etc." (Italics ours.)

In order to provide for the carrying out of this provision it became quite necessary to define what was meant by "the package;" and the three secretaries, on May 11, 1914, made the following, among other regulations, which are a part of F. I. D. 154.

"(a) Except as otherwise provided by this regulation, the quantity of the contents, in all cases of food, if in package form, must be plainly and conspicuously marked, in terms of weight, measure or numerical count, *on the outside of the covering or container usually delivered to consumers.*

"(c) The statement of the quantity of the contents shall be plain and conspicuous; shall not be a part of or obscured by any legend or design, and shall be so placed and in such characters as to be readily seen and clearly legible *when the size of the package and the circumstances under which it is ordinarily examined by purchasers or consumers are taken into consideration.*" (Italics ours)

Here the three secretaries—different in personnel than those making Regulation 2—construed the provisions of the Gould Amendment as dealing with the contents of the "*container usually delivered to consumers*"—which of course is the immediate container. To make this doubly certain, they declare that the labeling must be so placed and be in such characters that it may be *readily seen and be clearly*

legible to purchasers and consumers under the circumstances under which it is ordinarily examined by them, that is, while on the shelves of the retailer, or being handled by the purchaser preliminary to purchase. Here again the protection of the purchaser or consumer by the labeling that goes to him "on the container usually delivered to consumers"—the immediate container—is the subject of the regulation.

So we see that Congress not only in the original act passed June 30, 1906, but as late at March 3, 1913, in the Gould Amendment, according to the views of the three secretaries, legislated in utter disregard of the court doctrine of original package, and for the purposes of the Pure Food Law, made a "package" of its own, to which, not only the prohibitions found in sections 7 and 8, (See margin*) but the penalties found in sections 2 and 10 are applied.

Sec. 7. That for the purposes of this Act an article shall be deemed to be adulterated:

In case of drugs:

First. If, *when a drug is sold under or by a name* recognized in the United States Pharmacopoeia or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopoeia or National Formulary official at the time of investigation; Provided, That no drug defined in the United States Pharmacopoeia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly *stated upon the bottle, box or other container thereof* although the standard may differ from that determined by the test laid down in the United States Pharmacopoeia or National Formulary.

Second. If its strength or purity fall below the professed standard or quality *under which it is sold.*

In the case of confectionery:

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(4) The soundness of this position is denied by the defendant, who contends that when the outer wooden package is broken up the contents of the immediate container becomes mingled with the mass of property of the State and subject to the police power, as internal commerce of the State, and may not be sold even by the importer.

The case is ruled to the contrary by several decisions of this court.

McDermott vs Wisconsin, supra.

Seven Cases vs United States, supra.

Rast vs Van Deman & Lewis, 240, U. S. 342, 362.

Price vs Illinois, supra 455.

It was said in the McDermott case, page 131:

“The object of the statute is to prevent the misuse of the facilities of interstate commerce in con-

In the case of food:

First. If any substance has been mixed *and packed with it* so as to reduce or lower or injuriously affect its quality or strength.

Second. If any substance has been substituted wholly or in part for the article.

Third. If any valuable constituent of the article has been wholly or in part abstracted.

Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health; Provided, *That when in the preparation of food products for shipment they are preserved by any external application* applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, *and directions for the removal of said preservative shall be printed on the covering or the package*, the

veying to and placing before the consumer, misbranded and adulterated articles of medicine or food, and in order that its protection may be afforded to those who are intended to receive its benefits, the brands regulated must be upon the packages intended to reach the purchaser. This is the only practical or sensible construction of the act, and, for the reasons we have stated, we think the requirements of the act as so construed, clearly within the powers of Congress over the facilities of interstate commerce,, and such has been the construction generally placed upon the act by the Federal courts (citing cases.)" (Italics ours)

provisions of this Act shall be construed as applying only when said products are ready for consumption. (Italics ours)

Sixth

Sec. 8. That the term "misbranded" as used here in, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, *the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.*

That for the purposes of this Act an article shall also be deemed to be misbranded:

In case of drugs:

First. If it be an imitation of or offered for sale under the name of another article.

Second. If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.

In the case of food:

First. If it be an imitation of or offered for sale

Is not this language a clear indication of the purpose on the part of Congress to recognize the immediate container as a package of interstate commerce, and to follow that package and its contents by its regulations into the hands of the consumer? If this be true, then the contents of that package remains interstate commerce, until it reaches the consumer. If it remains interstate commerce as to branding, it remains such as to adulteration. In fact this court says as much in this extract from its decision.

In that case the defendant was being criminally prosecuted under the state statute for the sale of an immediate container, a can, of corn syrup branded contrary to the state statute. This court held that the labeling of the immediate container—which bore

under the distinctive name of another article.

Second. *If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta, eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide or any derivative or production of any of such substances contained therein.*

Third. *If in package form, and the contents are stated in terms of weight and measure, they are not plainly and correctly stated on the outside of the package.*

Fourth. *If the package containing it or its label shall bear any statement, design or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular; Provided, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:*

the label that violated the state statute—was within the provisions of the Food & Drugs Act, and, therefore, the state legislation was invalid.

Again the court said, at pp. 130-131:

“That the word ‘package’ or its equivalent expression, as used by Congress in sections 7 and 8 in defining what shall constitute *adulteration* and what shall constitute misbranding within the meaning of the act, *clearly refers to the immediate container of the article itself which is intended for consumption by the public, there can be no question.* . . . Within the limitations of its right to regulate interstate commerce, Congress manifestly is aiming at the *contents of the package, as it shall reach the consumer, for whose protection the act was primarily passed, and it is the branding upon the package which contains the ar-*

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of *or offered for sale* under the distinctive name of another article, if the name be accompanied *on the same label or brand* with a statement of the place where said article has been manufactured or produced.

Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations or blends, and the word “compound”, “imitation” or “blend” as the case may be, *is plainly stated on the package in which it is offered for sale*; Provided, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only; And provided further, That nothing in this Act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding. (Italics ours)

ticle intended for consumption itself which is the subject—matter of the regulation. Limiting the requirement of the act as to *adulteration* and misbranding simply to the outside wrapping or box containing the packages intended to be purchased by the consumer, so that the importer, by removing and destroying such covering could prevent the operation of the law on the imported article yet unsold, would render the act nugatory and its provisions wholly inadequate to accomplish the purposes for which it was passed.” (Italics ours)

If Congress could legislate as to the branding and adulteration of the contents of the immediate container, “as it shall reach the consumer,” that is *after he receives into his possession such contents*, as the court in effect holds in the language just quoted, may it not make such protection effective, by providing as it has in section 10 of the Act, for the seizure of the identical package bearing such contents, for confiscation and condemnation, in order to prevent the consumer from using the contents and thus being subjected to the very harm against which the Act was intended to protect him? If Congress may do this and intended to do it, as is clearly intimated by the court, then of necessity, at least one of the “original packages” of section 10 must be the immediate container.

Then, if Congress were “aiming at the contents of the package as it shall reach the consumer for whose protection the act was primarily passed”, in its regulation of the subject of branding, certainly it was aiming at the same contents of the same package, as it shall reach the consumer, *as to adulteration*. It is that contents and that alone which may be adulterated or misbranded, and, if so, bring harm to the consumer, and, of course, it is that contents with which the Federal act deals.

Seven Cases vs United States, Supra.

But this court has not, in subsequent cases, left the meaning of what it said in *McDermott vs Wisconsin* in any doubt, because in *Seven Cases vs United States*, supra, the court quotes at length from the opinion in the *McDermott* case, and reaffirms the soundness of the view expressed. It said, at page 515:

“The further contention that Congress may not deal with the package, thus transported, *in the sense of the immediate container of the article as it is intended for consumption, is met by McDermott vs Wisconsin*, 228 U. S. 215.” (Italics ours)

The power of Congress to deal with the immediate container, if necessary or convenient to enforce the purposes of its regulation, is no longer, if ever, in doubt, and that the purpose of the Food & Drugs Act may not be effectuated without dealing with the immediate container is not left in doubt, either by the *McDermott* case or any of this court's subsequent rulings on the same subject.

Rast vs Van Deman & Lewis, Supra;

In this still more recent case, this court makes yet clearer, if possible, the holding in the *McDermott* case, when it declares the word “package,” used in sections 7 and 8 of the act, means a package of interstate commerce. It is there said, p. 362:

“There (in the Food & Drugs Act) Congress, *for the effective execution of the Food & Drugs Act, defined what the ‘package’ of commerce should be, and necessarily any law which conflicted with it was void.*” (Italics ours)

As the Federal Act was dealing only with interstate commerce, it must necessarily result that the

"package" which the act defines, as the package of interstate commerce, is the immediate container—which is the only package *defined* by the Federal act, and the only package which this court was considering in the McDermott or in the Rast cases. That was the package the contents of which the court there declared was regulated by the act as to both adulteration and misbranding.

Rast vs Van Deman & Lewis is, in no respect, opposed to our contention, as claimed by counsel. No claim was made in that case that the Florida statute covered any part of the field of the Food & Drugs Act, nor that the statute was concerned with a question of misbranding or adulteration. Congress had not made an immediate container of a food, bearing a premium or gift coupon or certificate, an interstate package as here; nor had it outlawed such a package. While the Federal statute (Sec. 3394 as amended) taxing cigars and cigarettes permitted (by not denying) the right to enclose in tobacco packages tokens of the character named in the Florida statute, Congress had not attempted to *protect or enforce such permission*. There could, therefore, be no conflict between the Federal act, there invoked, and the state statute, nor could they be held to cover the same field. The situation was the same as though the Federal act relied on by the complainants had no existence. In that situation the sales sought to be protected against the state statute were left to be governed by the court doctrine of single sale in the outer wrapper or box, and of course wholly unaffected by any rule or regulation of Congress to the contrary. That is not the case here. This court was careful to point out this distinction between the McDermott case and the Rast case in the language above quoted.

Price vs Illinois, 238 U. S. 446.

In the Price case, as already seen, the Food & Drugs Act was not invoked by the complainant, nor was it considered by this court as having any bearing upon the case, evidently, because not invoked; and yet this court, out of abundant caution, expressly distinguishes that case from the McDermott case, and affirms the power of Congress to make the immediate container, as well as the outside wrapping or box, *a package of interstate commerce*. The court used the language already quoted at p. 39 of this brief, but which may very appropriately be quoted again:

“It should be added that *no question is presented in the present case*, as to the power of Congress to make provision with respect to the immediate containers (as well as the larger receptacle in which the latter was shipped) of articles prepared in one state and transported to another, *so as suitably to enforce its regulations as to interstate trade*. McDermott vs Wisconsin, 228 U. S. 115, 135.” (Italics ours)

The court thus implies that it was decided by the McDermott case that the power of Congress to make regulation of interstate commerce extends “so as suitably to enforce its regulations as to interstate trade,” as well to the immediate container of a food product as to the larger receptacle, the wooden box in which such containers are shipped into the state. It is also implied that the regulation of interstate commerce, by the Food & Drugs Act, could not be suitably enforced—that is, *the consumer adequately protected against misbranding and adulteration*—as it had already held in the McDermott case—except the container which goes to him carrying the food product he buys, is one of the packages regulated by the Federal Act.

(5) The fact that no one but the importer may be prosecuted for a sale under Sec. 2 of the Act does not affect the construction of the words "original packages" in that Section, or Section 10.

We are not disposed to claim that any person except the one receiving debased food or drugs from another state may be prosecuted under Sec. 2, for the sale or other disposition of such article. This would confine such prosecutions to the importer. Counsel seeks to make much of this fact, as though it had an important bearing on the construction of the words "original packages" in Sections 2 and 10. We fail to see the force of the argument.

Such importer may be a wholesaler or retailer; and if the latter he may be prosecuted under Section 2 for a sale or other disposition of a misbranded or adulterated article in an immediate container, just as the wholesaler may be prosecuted for a sale of such article in the outer package. This is the important fact in connection with the case at bar.

While the act restricts prosecutions for sales or other disposition in the receiving state to the importer, yet there is no requirement that such importer shall be a wholesaler who deals only with the outer package. He may be a retailer who deals only with the immediate container. Congress knew when it enacted this statute, that retailers deal only in the smaller packages, and it would seem to impeach common sense to say that Congress intended to deal with the wholesaler only and to grant immunity to the retailer—when the purpose of the law was not only to prevent the introduction of these contraband articles into interstate commerce, but to prevent their movement

therein after their receipt in the importing state, all to the end, however, that the consumer be protected from deception by misbranding and harm to his health and also deception by adulteration. From the standpoint of injury to the consumer, the sale of the article by the retailer is by far the most important. *Disposition of the outlawed article by the wholesaler to the retailer would accomplish no harm whatever, except as a means of reaching the consumer through a sale to him in the immediate container, by the retailer.* To say, therefore, that a sale by the retailer in the only package in which he deals with the consumer is outside of the Federal act, would result in the practical nullification of the act for the only purpose intended.

“There is nothing inconsistent in the remedies (of Secs. 2 and 10), nor are they dependent. The Three Friends, 166 U. S. 1, 49.”

Hipolite Egg Co. vs United States, *supra* p. 55.

Sections 2 and 10 supplement each other. They work together not only to prevent the outlawed articles reaching the hands of the consumer, but preventing their *use* to his harm in case they reach his hands. A prosecution and punishment of the importer, if he be wholesaler or retailer—dealer in the larger or smaller package—is important of course, in effecting the proposes of the act; but such prosecution and punishment may not prevent the harm to the consumer, which is the primary object of the legislation. So Section 10 provides for arresting the debased article itself, in order to prevent, in the case of food, its use by the consumer to his harm. The purchaser may ignorantly have bought for consumption, from the retailer in an immediate container, the article which has unlawfully found its way into the channels of inter-

state trade, and to permit it to go on its journey from the manufacturer to the consumer in the immediate container, or, if it has reached him, to stay the hands of the government in seizing it for confiscation and condemnation, in order to prevent its use by him, so long as it remains in the package in which he purchased it, would render the act practically worthless.

This court said in

Hipolite Egg Co. vs United States supra:

“It is certainly to the interests of a consumer that the article he receives, *no matter whence it come*, shall be pure and the law seeks to secure that interest, not only through personal penalties but through the condemnation of the article if impure.”

Congress having the power to render the act fully effective for its conceded purposes and its language being reasonably capable of such a construction, it is inconceivable that it has failed to make it so.

(6) Austin vs Tennessee, 179 U. S. 343, cited by counsel, does not sustain appellant's contention that the immediate container is not one of the original packages of the Act, but quite the contrary.

The decision was by a bare majority of this court—there being four dissenting justices. It was to the effect that single packages containing ten cigarettes, shipped in an open basket, were not original packages, *within the original package doctrine of the court*, and were therefore subject to the police power of the state—particularly a statute prohibiting their sale. The reason given for this ruling was that the size of the package and the manner of their shipment were a

transparent fraud on the law of the State to which the shipment was made—"a discreditable subterfuge to which this (the) court ought not to lend its countenance."

The minority of the court, in an opinion by Mr. Justice Brewer, replied to this, p. 383-384:

"Congress has prescribed the sizes of packages in which cigarettes are to be put up, and while it is true, as indicated in *Plumley vs Massachusetts*, 155 U. S. 461, that the primary purpose of such legislation is the collection of internal revenue taxes, *and not the regulation of commerce between the States*, yet it is also true that it is not within the power of the States to declare that the use of packages of the size prescribed by Congress is illegitimate, . . . *The use of such a package, legitimate for one purpose is legitimate for others*, and a State by its statutes can not in any way nullify or weaken the effect of congressional enactment. So although these packages are small in size, they have the approval of Congress and must be considered as legal, and their use cannot be made illegal by state law." (Italics ours)

Mr. Justice Brown, speaking for the majority, in reply to this line of argument, said, p. 363:

"Practically the only argument relied upon in support of the theory that those packages of ten cigarettes *are original packages* is derived from the Revised Statutes, Section 3392, which requires that manufacturers shall put up all cigarettes made by or for them and sold or removed for consumption or use, in packages containing ten, twenty, fifty or one hundred cigarettes each. *This however, is wholly for the purpose of taxation—a precaution taken for the better enforcement of the internal revenue law.*" . . . (Italics ours)

Suppose the size of the package of cigarettes had been prescribed by Congress for purposes of interstate commerce, instead of "wholly for the purpose of taxation," would not the decision in that case have

been unanimous and to the effect not only that Congress had the power to prescribe the size of an interstate package, but that such package of ten cigarettes was an original package? It would seem so.

That is just what Congress has done in the Food & Drugs Act. It has defined the immediate container as a package of interstate commerce, and hence as an original package.

As the court said in

Rast vs Van Deman & Lewis, supra.

in the passage just quoted,

"There (in Food & Drugs Act) Congress, for the effective execution of the Food & Drugs Act, *defined what the 'package' of commerce should be, and necessarily any law which conflicted with it was void.*" (Italics ours)

Putting the Austin and Rast cases together they amount to a holding that the immediate container is an "original package."

We will recur to this subject later, after considering for a time the general scope of this Act, in its bearing on this subject.

V.

The whole journey of an interstate food product from the manufacturer in one state to the consumer in another, so long as it remains in either the immediate container or that and the outer wrapping or box, is within the regulations of Sec. 10 of the Food & Drugs Act as to misbranding and adulteration, no matter how many times, in the customary channels of trade, it is bought and sold.

First. This is plainly indicated by what is said in the McDermott case, p. 128:

"The Food & Drugs Act was passed by Congress under its authority to exclude from interstate commerce impure and adulterated foods and drugs, and to prevent the facilities of such commerce being used *to enable such articles to be transported throughout the country from their place of manufacture to the people who consume and use them, and it is in the light of the purpose and the power exercised in its passage by Congress that this act must be considered and construed.*" (Italics ours)

This shows plainly that Congress had in mind to regulate the whole journey of the adulterated article from the manufacturer to the consumer. The journey of interstate articles of food was not to be a disconnected one, broken up into parts—a part within and a part without interstate commerce—but a continuous one "*throughout the country from their place of manufacture to the people who consume and use them,*" as the court said. There is not an intimation in the language just quoted that it makes any difference to the Federal jurisdiction how many times the article has been sold, or through how many hands it may have passed in its transportation from the manufacturer to the consumer. The purpose of the act is to exercise Federal jurisdiction over the article *at all times, and in whomsoever's hands it may chance to come, in the customary channels of trade, in its journey from its origin to its final destination, provided it remains in one or both of the containers in which it was introduced into interstate commerce.*

This court used another significant expression on the same subject in the McDermott case, p. 131:

"The object of the statute is to prevent the

misuse of the facilities of interstate commerce, *in conveying to and placing before the consumer—* misbranded and adulterated articles of medicine or food, . . . (Italics ours)

Again it is clearly indicated that the whole journey of the interstate article from the manufacturer to the consumer was in the mind of Congress when it enacted this statute, and conferred jurisdiction on the Federal courts to arrest and destroy the article, if need be, for the protection of the consumer. It did not intend that a single foot of the journey should be immune from the searching eye of the Federal courts, or of the authorities entrusted with the execution of the statute. Congress knew the customary course of trade; it knew that the manufacturer sells his goods both to the jobber and to the retailer; and that one jobber may sell to another jobber and the latter to a retailer, and he to the consumer. Congress knew that all dealers, except the retailer, deal in the article in both packages—the inner and the outer package. The outlawed article was made the subject of regulation in both packages, and it was denied the facilities of interstate commerce so long as it remained in either. What difference does it make, in effecting such purpose, through how many hands the article which has stolen into commerce, may pass, or how many sales of it may have been made, during its journey from its origin to its final destination? Absolutely none. The consumer will be harmed in exactly the same way and to the same extent, if it reach his hands, whether the article was sold by the manufacturer to the retailer from whom the consumer buys, or the manufacturer sold it to a jobber in the state and he sold it to the retailer from whom the consumer bought. If it passed through the hands of two jobbers in the state be-

fore it reached those of the retailer from whom the consumer bought, the evil against which the Federal act is directed—the *use* of the article by the consumer in case of adulteration—is the same.

Second. Note the language of this court in

United States vs Lexington Mills Co. 232 U. S. 399, 409:

“The statute upon its face shows that the primary purpose of Congress was *to prevent injury to the public health* by the sale and transportation in interstate commerce of misbranded and adulterated foods. The legislation as against misbranding intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was—and not upon misrepresentations as to character and quality. As against adulteration, the statute was intended to *protect the public health from possible injury* by adding to articles of food consumption poisonous and deleterious substances which might render such articles *injurious to health of consumers.*” (Italics ours)

This language is quoted with approval in *United States vs Coca-Cola Co.* 241 U. S. 265, 276-277.

Such being the purpose of the statute can it be possible that the act fails of the accomplishment of its purpose, by not making adequate provision for the prevention of a deleterious article of food, which has been wrongfully put into interstate commerce, from reaching the consumer for whose protection it was enacted? It has made such provision in Sec. 10 of the act, if only the words “original packages” include the package which is to reach the consumer. It has failed to make such provision, if those words refer only to the outer box which will never reach the con-

sumer. Appellant contends for the latter construction of those words—a construction which renders the act futile for its only purpose, while appellee contends for the former construction which renders the protection of the consumer adequate.

(1) The Federal act must, therefore, follow the outlawed article from the hands of the manufacturer in one state into the hands of the consumer in another, in the package in which it was originally put up by the manufacturer for sale to the consumer, and in which it reaches his hands, no matter how many sales of it may have been made, while it is on its way from the one to the other, otherwise the Act utterly fails to accomplish the only purpose which has been declared, time and time again, by the courts, it was intended to serve—the protection of the consumer.

(2) A single illustration of the effect of the contention of the appellant—that there may be but one sale of the article in interstate commerce and that by the importer in the wholesale package—and all others are outside the act and within the police power of the state—will show its fallacy.

If the manufacturer sells to a jobber in Wisconsin, the latter may, of course, sell to a retailer; but the retailer may not, in such case, sell to the consumer, within either the protection or condemnation of the Federal Act. In order that sales to the consumer be within the act, the retailer who makes them must be the importer of the article and he himself sell to the consumer, according to appellant's contention, and then in the outer box only. *The retailer is immune from the provisions of the act, if he buys from a jobber who imported, and does not himself import.*

For if he breaks up the outer box and sells the immediate container to the consumer, such sale would be outside the penalties of the Federal act, because in the immediate container—as is always the case—no matter how gross may be the violation of its provisions. Did Congress make any such botch of this statute as that? *Certainly not.* As said in *United States vs Antikamnia Chem. Co. supra*, p. 668: in the quotation already made, where a similar omission was claimed:

“Nor can we consider as a case of omission that which involves so definitely the mischief which was intended to be redressed and which is fairly within the language of the law.”

(3) According to the appellant's contention the retailer—who always sells in the immediate container—would be entirely immune from the provisions of the act even though he be the importer, because to be subject to the act he must make every sale in the outer box or wrapper, unbroken.

This court apprehended this very result of a like contention, in the *McDermott* case, when it said, pp. 130-131:

“Limiting the requirements of the act to *adulteration* and misbranding simply to the outside wrapper or box containing the package intended to be purchased by the consumer so that the importer, *by removing and destroying such covering could prevent the operation of the law on the imported article yet unsold, would render the act nugatory and its provisions wholly inadequate to accomplish the purposes for which it was passed.*”

The court used the words “articles yet unsold,” but it might just as well have said “articles yet in an original unbroken package” because that was the fact in the *McDermott* case and such is the declared rule

of the statute. The article had been sold by the retailer in the immediate container in the McDermott case, and that was a part of the offense complained of:

This would seem to dispose of the claim that "original unbroken packages" of sections 2 and 10 do not include the immediate container defined in Sections 7 and 8.

Third. That the jurisdiction of the Federal courts under Sec. 10 continues over the interstate product so long as the same remains in an original unbroken package, without reference to the number of sales of same within the state, or in whose hands same may be found, is very plain from the language of the section itself.

(1) The words of Sec. 10, which define Federal jurisdiction over an imported article, are in the alternative. Either condition in which the article must remain is as effective as the other for the retention of such jurisdiction. The words are "remain unloaded, unsold, *or in original unbroken packages.*" If the article remain in "original unbroken packages," that is sufficient to the retention of Federal jurisdiction over it. No suggestion is here made as to where or in whose hands the article shall or may be found or remain in order that it be within the powers of this section, so long as it remain "in original unbroken packages." The latter alternative is one of the tests of jurisdiction.

(2) One of the plain purposes of this section, was to furnish evidence for or against the article, as to misbranding or adulteration, by affording an opportunity for inspection of the label and of the article it-

self. This would be only after the outer box or wrapping is broken open and the immediate container taken out, so that the label on *that* package may be examined, and the contents of that package inspected. Of course an opportunity might be afforded for an examination when the goods are on the shelves of the retailer "unsold" but ready for sale; but the Federal authorities may not know of the importation until after sale has been made by the retailer. So that act names three conditions, in *either* of which the article remaining falls within the provisions of the section. If the article be not unloaded, or if unloaded, it be not sold, or if both unloaded and sold, it yet remain "in original unbroken packages," in whomsoever hands it may be—because nothing to the contrary is stated—the provisions of Sec. 10 operate upon it. The article may be in the latter condition in the hands of the *consumer*, when its importation is first learned of by the Federal authorities. By the very terms of the act the article is as subject to inspection and seizure and destruction, *if* found to be contraband and in that condition, that is, in an "original unbroken package," in the hands of the consumer, as it would be before unloading or before sale in the hands of a jobber or a retailer, being the importer; otherwise this beneficent privilege of inspection might be defeated.

McDermott vs Wisconsin, *supra*, 133.

(3) But, the article remains subject to the jurisdiction of Sec. 10 and of the Federal courts, to the exclusion of the state police power, so long as the article remains "unsold, or in original unbroken packages." Assuming—without declaring—that the word "unsold" refers to the importers disposition of the

article, it will be noticed that the Act does not say that the article shall remain "unsold" *in the outer box or package*. It does not say that the importer, if a retailer, may not break up the shipping box or package, and take out the immediate containers and put them on his shelves for sale—so long as they remain unsold—without mingling them with the mass of property of the State and thereby subjecting them to the police power of the State. Any such claim would involve the adding of a limitation or condition not found in the statute. If the retailer can break up the outer package without the police power of the State attaching, as this court has held in the McDermott case, then the Federal act wholly disregards the original package of the doctrine of the courts, and treats it as not applicable to the situation being provided for by the Act. The doctrine may not exist in part. Once break up the wholesale or shipping package and still have the article remain an interstate article, subject to Federal jurisdiction and disposition, and not within the police power of the State, the doctrine no longer remains, as applicable to that situation.

(4) Appellant's counsel recognizing the holding in McDermott vs Wisconsin, opposed to their contention ask the court to reconsider that case.

Defendant's counsel admit that McDermott vs Wisconsin denies the applicability of the original package doctrine of the courts to a case controlled by the word "unsold" of Sec. 10, and hence to that extent destroys the basis of appellant's claims here. For that reason they feel compelled to ask this court to reconsider "that portion of the decision", apparently failing to realize that this court has, since the Mc-

Dermott case, pronounced at least three other decisions to a similar effect (*Price vs Illinois*, 238 U. S. 446, 455, *Rast vs Van Deman & Lewis*, 240 U. S. 342, 362, *Seven Cases vs United States*, 239 U. S. 510, 514-515) and also overlooking the fact that in the McDermott case the court made the same ruling, in effect as to the words "original packages" and that "this is the only practical or sensible construction of the Act."

VI.

But the case is yet stronger for the appelle. The original package and single sale doctrine of the courts has no application to contrabands of interstate commerce, but alone to legitimate subjects of such commerce.

Counsel utterly lose sight of this important consideration.

The state statute goes upon the theory that a food product containing benzoate of soda is adulterated—as that word is defined in the Food & Drugs Act—and is therefore a contraband of both intrastate and interstate commerce. Whether it is outlawed in interstate commerce is for the Federal Courts to determine but in the determination of that question the original package doctrine of the courts has no application.

FIRST. This court in *Seven Cases vs United States*, supra, directly meets the contention of the appellant asserted here, and declares that the original package doctrine of the courts has no application to *contrabands* of commerce against which the Food & Drugs Act is directed, but to legitimate commerce only. After referring to what was held in the McDermott case, as to the immediate container being one

of the packages of interstate commerce regulated by the Federal Act, the court uses this language, p. 516:

“ . . . the doctrine of original packages set forth in repeated decisions, *which protected the importer in the right to sell the imported goods, was not 'intended to limit the right of Congress, now asserted, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles and to choose appropriate means to that end.'*” (Italics ours)

That doctrine was not only established in the absence of any definition by Congress of the time when the police power of the state would attach to a legitimate article of trade moving in interstate commerce, but was declared by the courts to protect a right in the importer of such an article to sell the article freed from any power of the state to prevent such sale. But no right to sell a contraband of commerce exists in the importer. Such an article is denied all facilities of interstate commerce and necessarily the original package and single sale rule of the courts can have no application. Congress may not only so declare, but it may make any provision it chooses to prevent the introduction of such an article into commerce among the states, or to arrest it in case it gets into such commerce, in order that it may not do the harm Congress is seeking to avoid. These considerations must not be lost sight of in construing the Act, particularly Sec. 10.

One of the appropriate means chosen by Congress to keep such contrabands out of interstate commerce is the power conferred by Section 10 upon the Federal courts to hunt out and seize for confiscation and condemnation the very package of commerce in which the adulterated or misbranded food is contained and goes to the consumer, to be destroyed, or sold and the pro-

ceeds conveyed into the Treasury of the United States, as the court may determine. In order that the consumer may not buy the immediate container, or, in case he does buy it, in order that he may not use its adulterated contents, the power is given to the Federal courts to lay hold of this particular container even after it is taken from the outside wrapper or box, in which it and other like containers are shipped into the state, and provide for its destruction. Any other construction of the Act renders it an empty and futile attempt at the protection of the consumer.

Second. As to contrabands of commerce, the power of Congress knows no bounds, in the means it may adopt to prevent the introduction of such articles into commerce, or to expel them from commerce or to prevent their use, if they once get in.

(1) *There is no such thing as "the mass of property of the State" to limit the absolute and supreme power of Congress to accomplish its purposes as to contrabands of interstate commerce.*

This court, in *Hipolite Egg Co. vs United States*, supra, p. 57, said of such contrabands of commerce as misbranded or adulterated food products:

"In other words, transportation in interstate commerce is forbidden to them, and in a sence, they are made culpable as well as their shipper. It is clearly the purpose of the statute (Food & Drugs Act) that they shall not be stealthily put in interstate commerce and be stealthily taken out again upon arrival at their destination, and be given asylum in the mass of property of the state. Certainly not, when they are yet in the condition in which they are transported to the State, or to use the words of the statute, while they remain 'in the

original unbroken packages.' *In that condition they carry their own identification as contrabands of law.* Whether they might be pursued beyond the original package we are not called upon to say. *That far the statute pursues them, and, we think, legally pursues them, and to demonstrate this but little discussion is necessary.*" (Italics ours)

Then again, on page 58, the court said:

"There is here no conflict of national and state jurisdiction over property *legally* articles of trade. The question here is whether articles which are outlaws of commerce may be seized, *wherever found*, and it certainly will not be contended that they are outside of the jurisdiction of the National Government when they are within the borders of a State. The question in the case, therefore, is, '*What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property?*' To give them such immunity would defeat, in many cases, the provisions for their confiscation, and their confiscation or destruction is the especial concern of the law." (Italics ours)

(2) In other words such contrabands of interstate commerce are not within the police power of the state, *when Congress has outlawed them, and provided for their seizure*, for condemnation and destruction, as it has done by the Food & Drugs Act. *They may not hide, or find asylum in the mass of property of the State, that is, in the police power itself, in an effort to avoid the power granted to the Federal courts by Congress*, to seize them for destruction or sale as the courts may determine. Nor may they any more hide behind the original package or single sale doctrine of the courts, when Congress has declared for their seizure and destruction, than they may hide or find asylum in the mass of property of the State, or, in other words, behind the police power of the State, under

the same circumstances. The will of Congress over them is supreme, when once asserted.

The court in the *Hipolite Egg Case* also used this very apt language in its application to this case, at pp. 57-58:

"We are dealing, it must be remembered, with *illicit* articles—articles which the law seeks to keep out of commerce, because they are debased by adulteration, and which law punishes them (if we may so express ourselves) and the shipper of them. There is no denial that such is the purpose of the law, *and the only limitation of the power to execute such purpose which is urged is that the articles must be apprehended in transit or before they have become a part of the general mass of the property of the State. In other words, the contention attempts to apply to articles of illegitimate commerce the rule which marks the line between the exercise of Federal power and State power over articles of legitimate commerce. The contention misses the question in the case.*" (Italics ours)

So here counsel's contention "misses the question in the case." They attempt to assert the right of an illicit article—which they assert this to be—to find asylum in the police power of the state, or what is the same thing, to say that an illicit article must be apprehended before it reaches the mass of property of the state or before it leaves the outer wrapping, and while it yet remains in the hands of the importer. This doctrine is utterly destructive of the power of Congress to deny to such illicit articles the facilities of interstate commerce, and, in order to effectively enforce such denial, to lay hands upon the article wherever it may be found and without reference to the number of sales that that may have been made of it, so long as it still remains in the condition prescribed by Congress, that is in an original unbroken package.

The only ground upon which counsel base their claim that the sale of appellee's food products in the immediate container is intrastate—internal traffic of the State—is that by breaking the outer package the contents become mingled with the mass of property of the State, that is, finds asylum therein. This idea is wholly repudiated by the cases to which we have just referred.

THIRD. We do not overlook the force of the claim that words which have been used by the courts and perhaps in former legislative acts must usually receive a similar construction in subsequent legislative enactments; but that rule is never enforced to override the plain meaning of such later enactments. If such later enactments require a different construction in order that the purposes of the enactment be effected, they will be given a different meaning. This rule is frequently enforced by the courts.

To use the words "original packages" in connection with a situations which is not governed by the original package doctrine of the courts, gives no license for saying that those words are used with the same meaning they would have were they used in a case governed by that doctrine, especially when if read with other language in the Act and in the light of the purpose of the Act, it is evident they may be given no such meaning.

FOURTH. It would seem that this court expressly determined the meaning of the words "original packages" when in *McDermott vs Wisconsin*, it said, p. 130:

"That the word 'package' or its equivalent expression, as used by Congress in Secs. 7 and 8 in defining what shall constitute adulteration and what shall constitute misbranding *within the meaning of the act*, clearly refers to the immediate container of the article which is intended for con-

sumption by the public, *there can be no question.*"
(Italics ours)

When the court declared that the word "package" within the meaning of the act meant the "immediate container" or, perhaps, *included* the immediate container, it meant "within the meaning of the *entire* act," not merely Secs. 7 and 8, but Secs. 2, 3, and 10 as well. The court was considering the means Congress had made use of to make its enactment effective for the purposes intended, and, in effect—although not in words—declared that the immediate container is one of the original packages of Secs. 2 and 10.

Fifth. "Original Packages" mean the first packages.

In order that the Food & Drugs Act be given its full operation, the words "original packages" must, in all reason, aside from authority, be given the meaning of the "*first* packages"—those in which the article is originally put up by the manufacturer to reach the consumer, and in which the article was shipped into the State. The word "packages" used in Secs. 2, 3 and 10 of the Act can not be disassociated from the word "package" in Secs. 7 and 8, because the sense in which it is used in the latter sections defines the sense in which it is used in the former sections. There are usually two such packages. They are both *original* packages in this sense, because the only packages in which the article has been packed, or moved in commerce. Congress knew of these two packages—the immediate container and the outer wrapper or box—when it used the words "packages" in the act, and must be assumed to have used it to designate both packages, in which interstate shipments are customarily made, of both drugs and food.

Section 8 refers to the contents of the immediate container as "the contents of the packages as originally put up." This is the sense in which the word "original" is used in sections 2 and 10, instead of the sense in which it is used in the doctrine of original package.

(1) It will be noted that the words "original unbroken packages" are in the plural—thus indicating that more than one package was meant. There is but one *original package* concerned in the court doctrine of "original package." That is the *outer* wrapping or package. This plural expression may not be especially significant, but it seems to indicate that more than one package was in the mind of Congress when it used those words and one of these must be the immediate container.

(2) So also Section 3 uses the words "unbroken packages" as the equivalent of "*original* unbroken packages" in sections 2 and 10, thus clearly indicating that the word "*original*" as used in sections 2 and 10 has no special significance, or, at least, has no reference to the original package doctrine of the courts, but merely to the "packages" which are customarily used in packing foods or drugs, for shipment in interstate commerce and for sale to the public—the immediate container and the outer box or wrapping. "Unbroken packages" are the "packages" of sections 7 and 8 "unbroken."

Sixth. The designation "original packages" has been used in state statutes before and since the Food & Drugs Act in the sense of immediate containers.

Kentucky Board of Pharmacy vs Cassidy, 74 S. W. 730.

People vs Abraham, 44 N. Y. Sup. 1077.

Harris vs State, 29 S. W. 751.

Williams vs Walch, 222 U. S. 415, 423.

The Kentucky statute involved in the first case provided as follows, p. 732:

"Any person or persons not a registered pharmacist may open, own or conduct a drug store or pharmacy if he or they keep constantly in charge of the same a registered pharmacist; but shall not himself or themselves sell or dispense drugs or medicines except proprietary or patent medicines, *in original packages.*"

The court said of this statute:

"The term 'original package', as applicable to sale of patent and proprietary medicines means, and is so understood by all persons, *the small individual package or bottle as prepared for retail*, and not the larger box or package—in which small packages may be shipped from the manufacturer."

So in the New York case just cited, a statute of that state provided that a registered pharmacist shall not be responsible for the quality of drugs or medicines sold by him "in the original packages of the manufacturer." The "packages" there involved were small bottles, plainly the individual containers of the drugs. In a criminal prosecution for a violation of the statute the court treated these small bottles as the "original packages of the manufacturer."

In *Williams vs Walch*, *supra*, it was sought by one of the parties to give to the words "original packages" used in a Kansas statute, the same meaning as attaches to them in the original package doctrine of the courts, because those words had "a technical meaning well known to the members of the Kansas legislature," but this court replied "We are not impressed by the reasoning."

These cases show that the words "original packages" are not to be given a technical meaning which is at variance with the plainly declared intent and purpose of the statute in which they are used, as would be true in the case at bar, were they to be given the construction contended for by the defendant.

In *Pittsburgh etc. Ry. Co. vs Backus*, 154 U. S. 421, 430, where a railroad taxing law used the expressions "railroad track" and "rolling stock" in designating the thing to be taxed, this court construed them to be comprehensive enough to include all railroad property. The court used this language:

"Obviously it was assumed by that (lower) court, though the matter is not discussed in the opinion, that by those two descriptive terms the legislature, *carrying out the declared purpose of subjecting all property within the State to taxation*, not expressly exempted, meant to include all the property owned or used by the railroad companies in the operation of their roads, and which may fairly be called 'railroad property.' " (Italics ours)

Here again the "purpose" of the statute is the touchstone of its interpretation.

This court referring to the word "income," used in the Federal act, said in

Towne vs Eisner, 245, U. S. 418, 425.

"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

VII.

Unless the "package" of Sec. 7 and 8 of the Food & Drugs Act—the immediate container as declared in the McDermott case—is one of the "original packages" of Secs. 2 and 10, the penalties of the act are not coextensive with

its prohibitions—in fact cover none of its prohibitions.

In order that the jurisdiction of the courts under Sec. 10 extend to the contents of the immediate container—as the courts declare it does—and as the protection of the consumer requires it shall, the words “original unbroken packages,” used in that section, *must* be construed in connection with sections 7 and 8, which are the only sections of the act that define misbranding or adulteration, or define the “package” which bears the label or brand, and which contains the food the subject of regulation as to adulteration.

The court has declared in the McDermott case that the word “package” used in sections 7 and 8, as to both misbranding and adulteration, clearly refers to the immediate container of the article which is intended for consumption by the public. That is the containing package of the article, the adulteration of the contents of which the act prohibits, and the package, the misbranding of which the act prohibits. *No other sections contain any definition of the things prohibited by the act.* Nor is the violation of these prohibitions of Secs. 7 and 8 penalized anywhere else in the Act than in Sections 2 and 10, and not there unless the “package” of sections 7 and 8 is at least one of the “original packages” of sections 2 and 10, in which the article must remain in order to be subject to these sections. Everything that may be done, with a misbranded or adulterated article in interstate commerce, in violation of either Sec. 2 or Sec. 10, must be done while the article is in a package defined by sections 7 or 8, which define misbranding and adulteration, “within the meaning of the Act.” Unless, therefore, the immediate container is one of the “original pack-

ages'' of Sec. 10, no proceeding *in rem* is provided in the act against the immediate container or its contents, even though misbranded and adulterated; and it may not be seized for confiscation even though it be misbranded or its contents adulterated.

United States vs Freeman, 239, U. S. 117, 120.

United States vs Chavez, 228 U. S. 525.

The "package" referred to in Secs. 7 and 8 are not meant to be enclosed in the wooden box or outer wrapper, in order that they be within those sections or necessarily within Secs. 2 and 10. They may be misbranded and their contents be adulterated, within the meaning of those sections, when outside as well as when enclosed in such box or wrapper. The misbranding and the adulteration of Sec. 10 is the same as that defined in Secs. 7 and 8, because, those latter two sections *alone* define adulteration and misbranding, and the article is guilty under Sec. 10 only when misbranded or adulterated "*within the meaning of the Act,*" that is within the meaning of Sec. 7 or Sec. 8 of the Act, the only defining sections. So we must either say the "package" which is the immediate container, of Sec. 7 and 8, is one of the "original packages" of Sec. 2 or 10, or neither the person or article itself is punishable under the latter sections, for adulteration or misbranding.

VIII.

The debates in Congress on the bills eventuating in the Food & Drugs Act, or the statements of members of the House and Senate, with respect to the action of the conference between the Houses can not contravene or take the place of the language of the Act,

clearly indicating its purposes and certainly not the construction given it by this court.

It is only in cases of doubtful interpretation that even Reports to Congress, accompanying the introduction of a bill, or of a conference report between the two Houses, will be resorted to by the courts; but the courts are unwilling to extend this rule to include debates, or the statements of members of a committee of conference as to the scope of the bill agreed upon. The meaning of the scope of the words of a statute, when they are free from reasonable doubt, as this court seems already to have declared with reference to the Food & Drugs Act in the particulars we are considering, should be sought alone in the language of the enactment.

Lapina vs Williams, 232 U. S. 78, 90.

Caminetti vs United States, 242 U. S. 470, 490.

Mackenzie vs Hare, 239, U. S. 299, 308.

Pennsylvania R. R. Co. vs International Coal Co. 230 U. S. 184, 199.

The language of this court in *Mackenzie vs Hare* may very well be quoted as applicable to this case, p. 308.

“Whatever was said in the debates on the bill or in the reports concerning it, preceding its enactment or during its enactment, *must give way to its language, or rather, all the reasons that induced its enactment and all of its purposes must be supposed to be satisfied and expressed by its words*, and it makes no difference that in discussion some may have been given more prominence than others, seemed more urgent and insistent than others, presented the mischief intended to be remedied more conspicuously than others.” (Italics ours)

What may have been the views of other senators

or representatives than those named in counsel's brief does not appear except as expressed in the language of the enactment itself. It is very certain that several of those who spoke on the subject and expressed their final approval of the bill, supposed that the power of Congress over illicit commerce, in the means it might adopt to keep the channels of interstate commerce free from such articles, and to protect consumers from their harmful effects, was confined to dealings of the importer in the wholesale, or shipping package, as defined by the courts, in the absence of any definition of it by Congress itself, with respect to legitimate articles of commerce. The thought that a contraband article that is denied the facilities of interstate commerce could not find asylum in the mass of property in the State, that is, would not be immune from the regulations of the statute they were then enacting, because of the breaking up of the so-called original package of the court doctrine, seems not to have occurred to any of the senators or representatives who discussed the bill, in case counsel has referred to all such. Can the scope or effect of the Act be now controlled or limited, because of the misapprehension of those who enacted it, as to the full legal effect of the words of the act when applied to illicit articles, instead of lawful commerce? Certainly not. They may have builded better than they thought, but whether they did or not the public is bound by the legal effect of the words Congress had used in the act, reasonably construed. Those words must be construed in the light of the purposes of the act. It must be assumed that Congress intended to effectuate those purposes by the provisions it made, and their scope may not be limited or expanded, if need be, to meet the views expressed in the debates or in the statements of any member of

the Conference Committee, as to what is intended by the provisions actually incorporated into the statute.

IX.

Reference by counsel to numerous notices of judgment, in which proceedings under Sec. 10 were had against outer boxes or wrappers as "original unbroken packages" has no real bearing on the case.

The fact that the Government authorities usually, or even always, if that be the case, have proceeded against the outer cases, where they can usually seize a large shipment of the contraband goods instead of proceeding against a single or a number of immediate containers, gives no force to counsel's contention that the latter containers are not also "original packages", nor does it amount to a practical construction of Sec. 10 to the contrary. It merely shows that the Government authorities prefer to proceed against wholesale packages instead of immediate containers, so that they make their seizures when the packages are in the hands of the wholesalers or carriers instead of retailers or consumers. Decisions in cases, in which the questions here presented were not involved, nor raised nor discussed, so far as appears, are not binding as precedents in this case. As we are writing this brief, we haven't access to many of the Notices of Judgment referred to by counsel, but judging of their scope by the questions which would be presented under the facts as stated by counsel, we do not see how they can be of any assistance to the court in the consideration of this case. They certainly can not have the effect to overrule *McDermott vs Wisconsin*, *Price vs Illinois*, *Rast vs Van Deman & Lewis*, *Seven Cases vs*

United States, and Hipolite Egg Co. vs United States,, cited herein.

X.

Armour & Co. vs North Dakota, 240 U. S. 510, is not pertinent here.

The North Dakota statute there involved required that lard, not sold in bulk, should be put up for sale in pails or other packages containing a net weight of one, three or five pounds or some whole multiple of these numbers—which must be truthfully stated on the label. Armour & Co. had no packing plant in the state but had a branch establishment at Fargo, in the state “to which its goods (including lard) were shipped in car-load lots to be distributed therefrom.” The company in violation of the state statute put up and sold at retail to the State Food Commissioner Ladd, on Sept. 8, 1911, a package of lard of the net weight of two pounds and six ounces—the net weight not being stated on the label, as required by the statute, as one, three or five pounds or any multiple thereof. It could not have been so labeled truthfully.

It was contended by Armour & Co. that the statute was in violation of the Fourteenth Amendment, the Commerce Clause of the Constitution and the Federal Food & Drugs Act. The court held that it violated neither.

The Food & Drugs Act does not require that a food product such as lard shall be put up in packages of a designated net weight, as did the North Dakota statute; nor, at the time of the sale to Mr. Ladd, did the Federal Act even require the net weight of the contents of a food package to be stated on the label. Since

that time the Gould Amendment of March 3, 1913, was passed requiring the net weight to be stated on the label. But, not even now, is a package required to contain any particular net weight. No question of branding or adulteration, therefore, could arise under the Federal Act. It had no application to the case. That act did not deal with that subject at all, and hence it was open for action by the State. The case was squarely within the ruling of

Savage vs Jones, 225 U. S. 501.

where an Indiana statute, which required the ingredients of a stock food to be stated on the label, was held not to be in conflict with the Food & Drugs Act, because there was no requirement in the latter act that ingredients should be stated, although, if they were stated they were required to be truthfully stated.

The Federal Act, therefore, was inapplicable to the case, and being inapplicable, the validity of the North Dakota statute was to be judged as though the Federal Act had never been passed. That is, the question of whether the sale to Ladd was an act of intrastate or interstate commerce was open for determination, and if it were the latter, the doctrine of original package and single sale by the importer, was also open; and if the former, then nothing stood in the way of the complete operation of the police power of the State.

The state court held that the sale to Ladd was an act of intrastate commerce—of the internal trade of the state—because the lard having been shipped into the state by Armour & Co. itself, and there held by it for sale when it sold to Ladd at retail, the lard had ceased to be interstate in character, and had become mingled with the property of the State, and subject to the police power.

Chi. Mil. & St. P. R. C. vs Iowa, 233 U. S. 334,
343-344.

This court affirmed that ruling. What it said in regard to the relation of the State statute to the Food & Drugs Act was, therefore, in perfect harmony with our contention here.

XI.

The provision of Sec. 10 to the effect that goods which have been condemned by a Federal court as misbranded or adulterated "shall not be sold in any jurisdiction contrary to the provisions of this act or the laws of that jurisdiction", and similar terms required in the bond for the possession of the goods by the owner, do not indicate any other construction of the words "original unbroken packages" than we have given.

It must not be overlooked, in considering these clauses of Sec. 10, that the article to which those words are applied, has been condemned by a Federal Court as an outlaw of interstate commerce, and, in the discretion of the court, subject to destruction or sale by the Government, but the sale not to be contrary to the Federal act or the laws of the jurisdiction where made. Certainly that must mean a valid enactment of such jurisdiction. It could not be intended to recognize an invalid statute of any jurisdiction. If a statute of a state is violative of the Federal act, or undertakes to cover the same field, and therefore inoperative, it is not a "law" of any jurisdiction but a mere nullity. But since the article to be sold is debased by adulteration or mis-

branding under the Federal Act and should not receive Federal recognition as a legitimate subject of traffic, either interstate or intrastate, the Federal Act might very well provide that the Federal authorities should not dispose of the outlawed article contrary to the State law, just as it has given recognition by the Wilson Act and the Webb-Kenyon Act, to the operation of State laws, condemning the sale therein of intoxicating liquors. That is, when the government itself has the power of disposition of such contrabands of trade, it will out of comity, or courtesy, give recognition to the state laws which without such recognition might have no force whatever in the premises. It is certain Congress could not have intended by these clauses of Sec. 10 to run counter to or defeat the conceded purposes of the Act in which they are found, or in any manner weaken the effectiveness of the means which it has adopted to secure such purposes. Especially is this true since the sale, by the very terms of the section, may no more be contrary to the Act itself than it may be to the laws of other jurisdictions.

A case might very well arise, where these provisions of the Act could operate without affecting in any way the construction of the words "original packages." For illustration, an article might be condemned by a Federal court as adulterated, and yet be properly branded under the Federal Act. But it might not be branded as required by the statutes of the jurisdiction where a sale would be made if one were to be made. The case might be such a case as *Savage vs Jones*, supra, or it might even be such a case as *Armour & Co. vs North Dakota*, supra. There the state law and the Federal Act, as held by this court, do not cover the same field and yet the Food & Drugs Act does not permit, even in such a case, a sale of a contraband, which would violate the state law. It is evident that such cases as these were in mind when Congress enacted the provision prohibiting a sale in violation of a statute of the jurisdiction.

XII.

The restaurant keeper has a legal right to make use, on his tables and lunch counters, of such of appellee's food products as he has purchased, in the unbroken immediate container, for such use.

Assuming that the purchase of the article by the restaurant keeper for consumption by his patrons is in interstate commerce, and protected against the operation of the state statute by the regulations of the Food & Drugs Act, the finding by the Secretary of Agriculture of the harmless character of benzoate of soda, and Regulation 15 of the three secretaries, the question arises,

First. Is the customary use of such article for consumption by the patrons of the restaurant keeper a lawful incident of its purchase in interstate commerce, by the restaurant keeper for such use? We insist it is.

Congress has declared, through the authorized action of the Secretary of Agriculture, under Public Act 382 of June 30, 1906, that benzoate of soda is a harmless ingredient in food; and by the action of the three secretaries, under authority of the Food & Drugs Act, that food containing benzoate of soda, if labeled as their regulation requires—as appellee's products concededly are labeled (Transcript 2 R. 4-5)—is a lawful subject of interstate commerce, in the hands of the purchaser of an immediate container. A restaurant keeper buys a bottle of plaintiff's catsup for the sole purpose of having it consumed by his patrons. Is not such use an essential element or incident of the purchase—just as a sale of an imported article in an

essential element of importation—without which the purchase itself is a mere empty delusion, because robbed of one—in fact the chief—of its customary incidents? No one would deny that the purchaser himself may not uncork the bottle of catsup and eat from it, without interference on the part of the state. May he not also, lawfully, feed its contents to his family? It would certainly seem so. If he may open the bottle and eat its contents or feed them to the family, without being subject to the police power of the state, it must be because such act is a part of the interstate transaction of purchase. The article is manufactured for consumption, is imported for consumption, and is sold to the restaurant keeper for consumption. It may be consumed only by uncorking the bottle. This must mean a consumption in all the ways in which food is *usually* consumed—one of which is by patrons at the tables and counters of the purchaser, if he be a restaurant keeper. Such consumption is, therefore, an essential element and incident of the purchase by the restaurant keeper.

In *Rosenberger vs Pacific Express Co.* 241 U. S. 48, the right of a State to impose a license on places of business or agency of every express company where intoxicating liquors are delivered to the Express company on C. O. D. shipments, was denied, because the power to make C. O. D. agreements to collect and remit the price of an interstate shipment "*is incident to the right to make such shipments.*" It was held that were a contrary view entertained (p. 53)

"the limitations preventing state legislation directly burdening interstate commerce would no longer obtain and the freedom of interstate commerce, which has been enjoyed by all the States, would disappear."

The court declared that the contrary reasoning (p. 52)

“rests upon a misconception of the elementary notion of interstate commerce as inculcated and upheld from the beginning and as enforced in a line of decisions of this court beginning with the very birth of the Constitution and which in its fundamental aspect has undergone no change or suffered no deviation; *that is, that the interstate commerce which is subject to the control of Congress embraces the widest freedom, including as a matter of course the right to make all contracts having a proper relation to the subject.*” (Italics ours)

We are not asserting that the Federal courts have any jurisdiction, under the Food & Drugs Act, over the uncorked bottle of catsup. That jurisdiction seems to be confined to original *unbroken* packages; but, that any attempt on the part of the State to prevent a customary use of an interstate product, made a legitimate subject of interstate commerce in the hands of the purchaser for his use, is a burden on the freedom of interstate commerce repugnant to the commerce clause of the Constitution.

F. A. Patrick & Co. vs Deschamp, 145, Wis. 224, 228.

This Wisconsin case involved a statute of that state which forbade any foreign corporation transacting business or acquiring or disposing of property in the state, until it had filed with the Secretary of State a certain certificate and verified statement and paid a prescribed fee. The plaintiff, who had not complied with the statute, was foreclosing a mortgage received as security for the payment of the purchase price of an interstate shipment of property, and the question involved was the validity of such mortgage. The court held that the giving of the mortgage was a

part of an interstate transaction, and that, as to it, such a statute imposes a burden on interstate commerce.

The court said, (p. 228):

* * * it seems it can hardly be doubted but that the taking of security by mortgage for the payment of an interstate commerce debt is necessarily included, *within the scope of the term 'interstate commerce.'* *The interstate transaction can not be said to be closed until the purchase price is paid.* The taking of security for the payment of the purchase price is *one of the ordinary incidents of a commercial transaction*, not present in all, indeed, but frequently restored to not only for the benefit and convenience of the seller but of the purchaser as well. *To prohibit it or weight it down with burdensome conditions so as to materially interfere with its free exercise is certainly an attempt to regulate one of the very ordinary incidents of commerce.* Without the right to receive security for the purchase price the foreign trader has lost one of the ordinary instrumentalities which make successful business possible, and a way has been found by which a state may impair the freedom of commerce between the states by making it difficult for the foreign trader to collect or secure his pay." (Italics ours)

Is not the consumption of food, purchased in an interstate transaction for the purpose of consumption, by the purchaser, his family, "the stranger within his gates," or his guests or patrons as they are being fed at his tables, a part of the transaction of purchase? It is certainly an ordinary incident of such a purchase, in fact the sole reason for it. To deny this right is to deny the right of purchase for such use, which may not be done, as to a legitimate subject of interstate commerce, without placing an unlawful restriction upon the freedom of commerce between the states. To say that this incident of a purchase is outside of interstate commerce while the purchase itself,

for that purpose, is within the interstate transaction, would be to deny the right of purchase, because the consummation of the sole purpose of the purchase must be regarded as an incident to and an essential element of the purchase itself, otherwise the purchase is a barren right—has been robbed of its very essence. If the transaction of purchase is not completed until the price is paid, neither is the transaction of a purchase of a food *solely for consumption* by the purchaser, his family or patrons, completed until such purpose is made effective.

Second. Nor may the State supplement, any more than it may run counter to, the action of Congress in the Food & Drugs Act, by denying the right of the purchaser to consume the food from the open immediate container—the purchase of which in an original unbroken package is lawful under that act.

This court, in *Erie R. R. Co. vs New York*, 233 U. S. 671, 681, said:

“Indeed when Congress acts in such a way as to manifest its purpose to exercise its constitutional authority (over interstate commerce) the regulating power of the State ceases to exist.”

In the same case, at page 683, the court said:

“Regulation is not intended to be a mere wanton exercise of power. It is a restriction upon the management of the railroads. It is induced by the public interest or safety, and the ‘Hours of Service’ law of March 4, 1907, is the judgment of Congress of the extent of the restriction necessary. *It admits of no supplement; it is the prescribed measure of what is necessary and sufficient for the public safety and of the cost and burden which the railroad must endure to secure it.*” (Italics ours)

Charleston & Car R. R. Co. vs Varnville Co.
237 U. S. 597, 604.

New York Cent. R.R. Co. v. Winfield 244 U. S. 147, 153.

When Congress enacted the Food & Drugs Act it intended to follow an interstate article of food that remains in an original unbroken package into the hands of the last purchaser, the person who intends it for consumption, in any and all ways that food is customarily consumed. Congress seemed to deem the public safety sufficiently safeguarded against adulterated food, if it conferred jurisdiction over the article so long as it remained in an original unbroken package. The purpose of the act was not to protect one person out of the whole mass of the public, but the whole public—not merely the restaurant keeper who may eat the food he buys, or his family to whom he may feed it, but as well those who bear to him almost as close a relation, his patrons—who eat the food he has bought solely to be placed before them for eating. In other words, the aim of Congress was to protect, against adulterated foods, *all* consumers, whoever they may be, or whatever relation they may hold toward the person who lawfully buys for consumption an article of food, in the container in which it was imported into the state, Congress knew that the ultimate purchaser would buy the article in the immediate container, that he would buy it for consumption and would necessarily be compelled to open it for that purpose; and therefore, Congress must have regarded the provisions of the Federal Act as entirely adequate for the protection of all consumers to whom the contents of such container would in the ordinary and usual course of events, go. Congress knew restaurant keepers and hotel keepers would not eat all the food they buy, but would buy for the consumption of the many who chance to become their patrons, and who may be able to secure their food in no other way. Congress did not regard it necessary to follow the article beyond

the point where it reaches the hands of the person who is to finally dispense it for consumption. In other words, as said in the *Erie* case, it was "the judgment of Congress of the extent of the restrictions necessary . . . a prescribed measure of what is necessary and *sufficient for the public safety*," and "admits of no supplement."

The case of *Northern Pacific Ry. Co. vs Washington*, 222 U. S. 370, is another illustration of the same doctrine. There the taking effect of the Hours of Service law of Congress, was postponed for one year, and the state legislature undertook to legislate on the same subject for that year's period. The court denied the validity of this legislation and held that in such a case, the right of the State to legislate could result only from the silence of Congress. The court said at pages 378-379:

"To admit the fundamental principle and yet reason that because Congress chose to make its prohibition take effect only after a year, the matter with which Congress dealt remained subject to state power, is to cause the act of Congress to destroy itself; that is, to give effect to the will of Congress as embodied in the postponing provision for the purpose of overriding and rendering ineffective the expression of the will of Congress to bring the subject within its control—a manifestation arising from the mere fact of the enactment of the statute."

Can it be possible that Congress would follow an interstate article of food into the hands of the restaurant keeper who has bought it for service to his patrons, and there pronounce it wholesome and free from fraud or deception, *in the unbroken package*—as has been done in this case—and yet intend that the moment the package is opened—an absolutely neces-

sary thing to its consumption—the State may step in and penalize the customary use of its contents by the purchaser, on the assumption that it is unwholesome or fraudulent and deceptive? Must it not rather be concluded that Congress intended that its seal of approval, upon the contents of the unbroken package, shall be regarded as entirely “sufficient” for the protection of consumers of such contents, when the package is opened by its final purchaser and served to the intended consumers, and that such contents are intended to be free from any further regulation, *as to adulteration*, or at least so long as the contents of the unbroken container are concededly identical with those of the opened bottle or jar? It would certainly seem so.

Confining the Federal jurisdiction to the *unbroken* package was evidently because the identity of its contents would thus be certainly assured; and Congress seems to have thought it unwise to permit a forfeiture except the identity of the subject of the forfeiture be *thus* assured. But there is no inconsistency between this assurance of identity, as the basis of a forfeiture, and the fact that Congress intended by the Food & Drugs Act to set its stamp of approval, upon the contents of the unbroken package—*when conforming to the standards of the act—as a lawful subject of interstate commerce*, and the state may not declare such contents, even when the package has been broken, an unlawful subject of such commerce, as would be the result if the state statute be held valid.

We respectfully submit that the decree of the lower court should be affirmed.

H. O. FAIRCHILD,

Solicitor and Counsel for Appellee.

clause or the purpose of the Federal Food and Drugs Act, although the preservative, as used, is allowed by the federal act and regulations and the containers are labeled in conformity therewith.
Reversed.

THE case is stated in the opinion.

Mr. Walter H. Bender, Deputy Attorney General of the State of Wisconsin, with whom *Mr. Spencer Haven*, Attorney General of the State of Wisconsin, and *Mr. J. E. Messerschmidt*, Assistant Attorney General of the State of Wisconsin, were on the brief, for appellant.

Mr. H. O. Fairchild for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by Curtice Brothers Company, a New York corporation, to restrain Weigle, the Dairy and Food Commissioner of Wisconsin, from enforcing certain laws of the State, especially Statutes of 1913, § 4601g. That section makes it unlawful to sell any article of food that contains benzoic acid or benzoates, with qualifications not material here. The plaintiff makes such articles from fruit, and adds benzoate of soda as a preservative. It puts them up in glass bottles and jars properly labelled under the Food and Drugs Act (June 30, 1906, c. 3915, 34 Stat. 768), packs the bottles and jars in wooden cases containing a number of the same, and ships the cases from its factory in New York to customers in Wisconsin among others. Of course the single bottles are sold in the retail trade, and their contents are served to guests in restaurants and hotels. The defendant disavowed any contention that the state laws affected or purported to affect sales by the importer in the unbroken wooden packages containing the bottles and the decree

treated that subject as taken out of the case. But the bill went farther and setting up a decision, incorporated in a regulation under the Food and Drugs Act, that benzoate of soda is not injurious to health and that objection would not be raised to it under the act if each container should be plainly labelled, contended that under the Food and Drugs Act and the Commerce Clause of the Constitution, the Wisconsin law was invalid even as applied to domestic retail sales of single bottles or the contents of single bottles of the plaintiff's goods. The defendant stood on a motion to dismiss and the District Court made a decree following the prayer of the bill. The defendant appealed.

The argument in support of the decree contends in various forms that the sale of the individual bottles, when removed from the original package after entering the State, still is a part of commerce among the States, since the act of Congress as to misbranding applies to them. But the Food and Drugs Act does not change or purport to change the moment at which an object ceases to move in interstate commerce. It imposes an obligation to label the bottles severally, although contained in one original package, as of course it may. *Seven Cases of Eckman's Alternative v. United States*, 239 U. S. 510, 515, 516. It provides for seizure and condemnation of misbranded or adulterated articles that have been transported from one State to another, although the transit is at an end, while the articles remain unsold or in original unbroken packages, as again it may. There is no reason why a lien *ex delicto* should be lost by the end of the journey in which the wrong was done. The two things have no relation to each other. *Hipolite Egg Co. v. United States*, 220 U. S. 45, 57, 58. Finally, the duty to retain the label upon the single bottles does not disappear at once. For reasons stated in *McDermott v. Wisconsin*, 228 U. S. 115, if the State could require the label to be removed while the bottles remained in the importer's hands unsold, it could

WEIGLE v. CURTICE BROTHERS COMPANY.

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WISCONSIN.**

No. 83. Argued December 17, 1918.—Decided January 7, 1919.

As respects domestic retail sales of secondary packages, or the contents thereof, out of the original packages in which they were imported in interstate commerce, state laws forbidding sale of food articles containing benzoate of soda are not inconsistent with the commerce

interfere with the means reasonably adopted by Congress to make its regulations obeyed. But all this has nothing to do with the question when interstate commerce is over and the articles carried in it have come under the general power of the State. The law upon that point has undergone no change.

The Food and Drugs Act indicates its intent to respect the recognized line of distinction between domestic and interstate commerce too clearly to need argument or an examination of its language. It naturally would, as the distinction is constitutional. The fact that a food or drug might be condemned by Congress if it passed from State to State, does not carry an immunity of foods or drugs, making the same passage, that it does not condemn. Neither the silence of Congress nor the decisions of officers of the United States have any authority beyond the domain established by the Constitution. *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 362. When objects of commerce get within the sphere of state legislation the State may exercise its independent judgment and prohibit what Congress did not see fit to forbid. When they get within that sphere is determined, as we have said, by the old long-established criteria. The Food and Drugs Act does not interfere with state regulation of selling at retail. *Armour & Co. v. North Dakota*, 240 U. S. 510, 517; *McDermott v. Wisconsin*, 228 U. S. 115, 131. Such regulation is not an attempt to supplement the action of Congress in interstate commerce but the exercise of an authority outside of that commerce that always has remained in the States.

Decree reversed.